Supreme Court of the United States.

TERM OF 1875-'6.

No. 646.

HENRY M. RECTOR, Appellant,

vs.

THE UNITED STATES AND OTHERS.

Brief for Appellant.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.

Supreme Court of the United States.

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HENRY M. RECTOR *vs.* THE UNITED STATES.

BRIEF FOR HENRY M. RECTOR, UNDER FRANÇOIS LANGLOIS.

A.

POINTS OF FACT MATERIAL.

1. In the year 1814 an earthquake shattered a large extent of country on the west side of the river Mississippi, including the county of New Madrid, in the Missouri Territory, and the lands on the Upper St. François river, sinking large bodies of land, and forming lakes, and breaking up other lands with huge clefts and crevices, by which those confirmed to many settlers, under French and Spanish grants, were ruined or greatly injured.

2. One of these persons was François Langlois, who owned several tracts of land which he had purchased from other persons, in the vicinity of the village of Little Prairie, on the Grand Marais, River Gayoso, &c., and a tract of 200 arpents on Bayou St. John, in the district of New Madrid. This had been conceded to himself, by Henry Peyroux, commandant, on the 24th of September, 1800, and concession confirmed by Board of Commissioners, with order of

survey, January 17th, 1811, and 20th June, 1811, and certificate of right to patent of the latter date.

Record, pp. 449, 495, 6, 7.

3. He owned also two, or, perhaps three lots, of one arpent each, in the village of Little Prairie, as appears by the three certificates of the Recorder of Land Titles, hereafter to be mentioned. Two of these were lots 100 and 101, in square 26.

Record, pp. 427, 8, 430, 431.

4. By act of 17th February, 1815, persons whose lands had been materially injured by earthquakes were "authorized to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law." No one could locate under this act a larger quantity of land than that confirmed to him by virtue of French or Spanish grants, &c., except owners of lots or tracts of less quantity than 160 acres; nor could any one locate more (in all) than 640 acres. Upon its being made to appear to the Recorder of Land Titles for the Territory of Missouri, by oath or affirmation of a witness or witnesses, that any person was entitled to a tract *or tracts* of land under this act, the Recorder was to issue a certificate thereof to the claimant, entitling him to locate other land in lieu of that injured.

3 Stat. at Large, 211.

5. On the 24th of November, 1815, the Recorder granted to Langlois two certificates, Nos. 270 and 271, of injury *to the lots* 100 *and* 101, *in the village of Little Prairie*, each attesting his right to locate, in lieu of the lot, 160 acres.

Record, pp. 430, 431.

6. On the fourth of August, 1818, Langlois proved that the 200 arpents on Bayou St. John had been materially injured by earthquakes.

Record, p. 494.

7. On the 26th of November, 1818, the Recorder granted like certificate for injury to this tract, declaring the right of Langlois to locate two hundred arpents of land "on any of the public lands of the Territory of Missouri, the sale of which is authorized by law." This certificate is numbered 467.

Record, p. 277.

8. And on the 26th of November, 1818, the Recorder granted him another certificate, No. 470, certifying that a lot of one arpent, in the town of *New Madrid*, owned by Langlois, had been injured; and he having theretofore received the certificates, 270, 271, and 467, it was certified that he had the right to locate the residue of the quantity of 640 acres, provided such residue should not exceed 160 acres.

Record, p. 427.

9. Having obtained the certificate, 467, (under which Rector claims,) Langlois could *locate* 200 arpents of land, in lieu of those on Bayou St. John. This LOCATION was to be MADE, the law explicitly says, "on the application of the claimants, *by the Principal Deputy Surveyor* for said Territory, *or under his direction*;" and it was further made the duty of that officer "to cause a survey thereof to be made, and to return a plat *of each location made* to the said Recorder, together with a NOTICE in writing, designating the tract or tracts *thus located*, and the name of the claimant on whose behalf the same shall be made," which notice and plat the Recorder was to cause to be recorded in his office.

3 Stat. at Large, 211.

10. Sections two and three of this act seem to provide that the *Recorder* should "deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract herein designated;" and that the party should within twelve months, file this certificate with the Recorder, who issued it, and the Recorder should "there-

upon issue a certificate in favor of the party;" by transmitting which to the General Land Office, the party could obtain a patent. But section two presents an incomplete sentence; and section three reads, that it shall be the duty of the Recorder, and shall deliver, &c. And, as we shall prove, the whole apparent incoherency and absurdity was caused by clerical omission in copying, engrossing, or enrolling the act. In fact, the first certificate was to be given by the Principal Deputy Surveyor.

Upon such location being made, the injured land was to "revert to and become absolutely vested in the United States."

3 Stat. at Large, 211.

11. When this act was passed, there had been no public survey, under the general system of rectangular surveys, made, or even ordered to be made, of any of the public lands in the Territory of Missouri. There was no land office or land district in the Territory, and there was no order of the President to sell any lands in the Territory until some time in 1823. The survey of the fifth principal meridian, from which the public surveys in Missouri and Arkansas were projected, was not commenced until the 27th of October, 1815; and the earliest sub-divisional surveys in those States were made in 1816.

Certificate of the Com'r of General Land Office, Record, 305.

Statement of Counsel in Barry *vs.* Gamble, 3 Howard, 41.

12. The first direction for the survey of lands in Missouri was given on the 23d of March, 1815. On the 24th and 27th of March, 1815, the Commissioner instructed the Surveyor General at Chillicothe in regard to surveying 2,000,000 acres of military bounty lands, between the rivers Mississippi and Arkansas; and it was not until March 6, 1816, that the Commissioner informed the same Surveyor General that

the President had directed the survey of about one hundred townships in the vicinity of St. Louis, &c. No directions to survey other lands were given until after the year 1820.

Letter of Com'r of General Land Office to Surveyor General at Chillicothe; Volume ii of "Public Lands; Laws, Instructions, and Opinions," published by Gales and Seaton, in 1838, under resolution of the Senate, pp. 809, 810, 812.

13. Langlois sold his claim, under certificate ~~467~~ 467, to Joseph Story, and on the 1st of November, 1818, by instrument in writing, sealed, gave him power of attorney irrevocable to locate the claim, for his own use and benefit; to sell, transfer, and convey it; to convey to the United States, or their proper officer, the injured land, and to do in the premises whatever Langlois could; with power of substitution.

Copy, Record, pp. 277, 428.

14. On the 29th of November, 1818, Joseph Story, by virtue of power of attorney from François Langlois, remised, released, and transferred to the United States all his right, title, and interest in and to the injured tract of land on Bayou St. John, that belonged to Langlois. Which relinquishment also appears by the list of relinquishments of lands injured by earthquakes kept by the recorder of land titles.

Copies: Record, 305, 313.

15. Story, having obtained certificate No. 467, and being its absolute owner, by virtue of the power of attorney, did by endorsement on said certificate, made by him on the 4th of January, 1819, as attorney-in-fact for Langlois, and also for himself, assign and cede to Samuel Hammond all the right, title, claim and interest of both, to or in the said certificate, and all the benefits and rights to be derived from it; the consideration being six hundred and forty dollars,

acknowledged to have been then paid. The endorsement actually bears date the 4th of January, 1818; but as the certificate did not exist until the 25th of November, 1818, of course no endorsement on it could be of an earlier date. The error was simply the common one which few persons have not made during the first days of a new year.

Copy of certificate and endorsement, Record, p. 276.

16. On the 12th of July, 1819, François Langlois and Barbara his wife, for the expressed consideration of two hundred dollars, conveyed to Story, his heirs and assigns, the injured tract of land, two hundred arpents, on Bayou St. John, in New Madrid county, *and all their rights, privileges, and advantages arising therefrom, under the act of* 1815; which conveyance was duly acknowledged, and then, or immediately after, duly recorded in that county.

Copy, Record, pp. 279, 280.

17. On the 17th of January, 1819, Samuel Hammond and Elias Rector applied in writing to the Surveyor General for the Territory of Missouri, for the entry or location of two hundred arpents of land, to satisfy the said certificate, "to be surveyed in a square tract, the lines of which to be corresponding with the cardinal points, and to include the Hot Springs (so-called,) upon the waters of the Ouachita River, south of the River Arkansas, the said Springs to be as near the centre of the square as circumstances will admit . . . the Springs so to be included are those generally known as the largest and most resorted to upon that River."

Copy, Record, p. 282.

18. The Surveyor General ordered this survey to be made by James S. Conway, a deputy surveyor of the United States, resident in the Territory of Arkansas. It was made

accordingly, and his certificate or return of survey, with plat, was made out, in triplicate, on the 16th of July, 1820.

Record, (Affidavit of William Milburn,) p. 325.
(Deposition of John R. Conway,) p. 343.
(Deposition of Frederick R. Conway,) p. 344.
(Copy of survey and plat,) pp. 283, 350.

19. Of this return of survey and plat, two of the original triplicates are produced to the court. One of these is identified and proven by Frederick R. Conway, brother of James S. Conway, and who had been Recorder of Land Titles and Surveyor General at St. Louis; also by William Milburn, who has been dead some years.

Record, pp. 348, 350, 325–6.

The handwriting is proven by the affidavits of Willamouicz, Hutt, Langtree, Creas, Harrell and Causin, clerks and assistants in the Surveyor General's office at Little Rock. All of these are dead except the two last.

Record, p. 351.

Also, it is proven by depositions of John R. Conway, Ignatius Willamouicz and George A. Worthen; all of whom are dead.

Record, pp. 343, 328, 338.

Also, by depositions taken regularly in this case of A. H. Rutherford, Edward Cross, Frederick R. Conway, James R. Berry and John Hutt.

Record, pp. 313, 316, 344, 317, 320.

20. The paper on which the return of survey and plat are written bears the water-mark of Patterson & Co., and resembles that used in the Surveyor General's office at St. Louis, where, bringing his field-notes with him, Conway,

no doubt, made out his return and plat, or had the latter made out in form.

Record, Evidence of Willamouicz, Worthen and Berry, pp. 329, 338, 318.

And the lines of the survey by Conway have been traced, many of the marked and bearing trees found, (completely proving it to have been actually and in good faith made on the ground,) by Langtree and A. H. Rutherford, the latter of whom returns a full and complete re-survey.

Record, pp. 315, 313, Exhibit A, p. 321; Exhibit C, pp. 322 to 325.

Evidence of H. M. Rector, Jr., Record, p. 357.

21. On the 19th of February, 1819, in consideration of six hundred dollars, Samuel Hammond and Eliza, his wife, conveyed by deed to Elias Rector an undivided moiety of said certificate, and of the rights and interests accruing and arising from the same, and of the lands that had been located with it, which conveyance was duly acknowledged, and was recorded in the county of Clark, in the Territory of Arkansas, on the 19th of May, 1820.

Record, p. 284.

22. On the 24th of February, 1821, Story conveyed by deed to Hammond and Rector his right, title, and interest in the certificate, with covenant of warranty, which conveyance was duly acknowledged, and was recorded in said county of Clark (in which the Hot Springs were) on the 22d of July, 1821.

Record, p. 280.

23. Elias Rector died before August 30, 1822, on which day his will was probated. By it he devised his real and personal estate to his wife, for her life, and, at her death, remainder to his three children. The three children were all of tender age, and two died while infants, leaving Henry

M., the claimant, surviving, who became of age in May, 1837. His mother died in 1853.

Copy of Will: Record, p. 286.

Depositions of Frederick R. Conway and Ann B. Rapley, and oral testimony at the hearing, Record, pp. 346, 437, 443.

24. No conveyance from Hammond for the undivided interest of one-half in the certificate and location, which he retained in 1820 and 1821, has been found; but after more than fifty years, it will be presumed. Neither he, nor any person representing him, has, since Story conveyed to him and Rector, on the 24th of February, 1821, set up, preferred, or pretended to any interest in the claim, or aided or joined in any measures taken to enforce it. Nothing was done in regard to it, after the date of that conveyance, until Henry M. Rector came of age, and since then until now, it has been prosecuted by him alone, and at his sole expense; and Langlois has never set up any claim to any interest in the location or lands located, nor repudiated the action of Story, as his attorney-in-fact, nor made any reclamation whatever.

25. In order to perfect his title, Henry M. Rector filed bill in equity in the Hot Springs circuit court, in Arkansas, and obtained decree, on the 2d of March, 1853, vesting in him all the title, right, and interest, under said claim and location, of the said Langlois, Story, and Hammond, and of the wife of said Hammond.

Exemplification, Record, p. 310.

26. The survey, accurately and regularly made by James S. Conway, on the ground, and the marks whereof are still visible, was regularly and in proper form returned to the office of the Surveyor General, at St. Louis, about the 16th July, 1820, and it was unquestionably *received* there, and treated as belonging to the files of the office, and as a regular and official survey, for it was numbered 2,903 of the regular

official surveys; without being whereof it could have had no status or number there.

27. The list of New Madrid claims and locations made by Langham, Surveyor of the public lands in Illinois and Missouri, and certified by him on the 7th of January, 1833, to accompany the public records of surveys, &c., to the Surveyor of the public lands in the Territory of Arkansas, contains certificate 467, of François Langlois, located at the instance of Samuel Hammond and Elias Rector, and the survey thereof, No. 2,903.

Record, p. 291.

28. And Schedule or Exhibit F, (New Madrid claims,) which was on file in the office of the Surveyor General of Missouri, and is now on file among the archives of the United States surveys of Missouri, in the custody of Ernest H. Hesse, Deputy Recorder, under Stillman O. Fish, Recorder of Land Titles of the United States in Missouri, contains certificate No. 467, of Francis Langlois, Sr., issued November 26, 1818, located 27th January, 1819, survey No, 2,903, 200 arpents—with remark, "Located in Arkansas to cover Hot Spring."

It is an official and authentic registry of New Madrid claims and locations, made out and kept in the office for use and reference there. It is printed in the record, in full, but we have also had it photographed.

Testimony of Hesse, and Copy, Record, 353, 360.
Exhibit F, Record, 408.

29. One of the originals of this survey was deposited in the Surveyor General's office at St. Louis, and, upon the creation of the office of Surveyor General of Arkansas, it was transmitted, among the surveys and other papers belonging to lands in Arkansas, to the office of the Surveyor General, at Little Rock.

Affidavits of Calloway and Milburn, who are dead, Record, 326, 7; 325, 6.

30. That this is true also appears from the fact that the survey is on the list made out by Langham, in 1833, to accompany the records for the Arkansas office. That the survey was, in fact, returned and *approved*, is proven by affidavit of Milburn and by the deposition of Frederick R. Conway. That it was both returned and approved is established by the mere fact that it was recognized and registered as No. 2903. We do not mean that it was approved as constituting a valid location; but that it was accepted, recognized, approved, and registered as a correct survey, made in accordance with the application for location filed by Hammond and Story. It was approved as correct *work*. And the fact that it was registered proves that one copy of the survey and plat, at least, must have been retained and on file in the office. As that copy *should* properly have gone to the Surveyor General, at Little Rock, with the other papers transmitted, this suffices to raise the presumption that it *was* transmitted.

31. It was a matter of general notoriety, before the year 1838, that the New Madrid claim had been located by survey upon the Hot Springs. The Surveyor General, Edward Cross, knew it, and James S. Conway, his predecessor, and then Governor of the State, told him that he had made the original survey; and the impression of Judge Cross was that, in 1838, the survey made by Conway was on file in the Surveyor General's office. Philip Physick, in 1820, at the Hot Springs, learned that the location had been made by compass and chain, the surveyor setting his staff in one of the springs and laying off so many arpents of land; that surveyor being James S. Conway.

Testimony of Edward Cross and Philip S. Physick, Record, 316, 271.

32. On the 10th of July, 1816, the Commissioner of the General Land Office instructed the Surveyor General at St.

Louis that the tract of land which had been directed to be surveyed, for the purpose of being offered for sale at St. Louis, appeared to be the tract on which New Madrid locations were to be made.

Instructions and Opinions, 820.

33. On the 15th of April, 1817, the Commissioner of the General Land Office, said, in an official letter to the Surveyor General at St. Louis, "I approve of your determination, not to furnish the Madrid claimants with any documents, to enable them to apply for patents, until you have clearly ascertained that their locations do not conflict with prior claims." And he further expressed the opinion than lands which the President had not directed to be prepared for sale could not with propriety be deemed lands, "the sale of which is authorized by law."

Instr. and Opin., 816

34. On the 27th November, 1818, the Secretary of the Treasury decided that the pre-emptionact of 1814 could not be held to extend to any land not within the organized limits of the Territory of Missouri, that Territory being only so much of the country as was organized into counties.

Instr. and Opin., 296.

35. On the 11th of May, 1820, the Attorney General, Mr. Wirt, decided that locations under the New Madrid act must conform with the general plan of surveying the public land. On the 19th of June, he reiterated this decision, declaring that locations made in a square, previous to the sectional lines being run, could not be patented; saying that the sale was not authorized by law until the sectional lines were run, and consequently all locations previously made were unauthorized.

Instr. and Opin., 9, 10.

36. By a third opinion, he decided all locations not con-

forming to the lines of the public surveys to be *void*, and that patents could not issue on them; that it could not be permitted to cause fractions in the general survey.

The Secretary of the Treasury directed the Commissioner to conform to these decisions.

Instr. and Opin., pp. 13, 14.

37. And on the 5th of *July*, 1820, the Commissioner furnished copies of these opinions to the Surveyor General at St. Louis, informing him that the Secretary of the Treasury had directed that locations not conformable to law might be withdrawn or amended, so as to conform to the sectional lines.

Instr. and Opin., p. 820.

38. These instructions must, in due course of mail, at that day, have reached the Surveyor General at St. Louis within a day or two, before or after, of the very time when the survey by Conway was returned, *i. e.*, the 16th of July, 1820; and the land on which the location was made not having been surveyed, nor directed to be surveyed, and the survey, therefore, not conforming to the lines of the public surveys, since there were no such lines to be conformed unto, the Surveyor General could not, without direct disobedience of the orders, and contemptuous disregard of the decisions of his superiors, accept the survey as a valid location of the Langlois claim, or grant a certificate on it, entitling Rector to a patent. He could only approve it as a correct survey, number it, and place it on file, and thus preserve to the locator his right to insist upon it thereafter as a valid location.

39. It appears by a letter of the Commissioner to the Surveyor General at St. Louis, of date September 2, 1820, that the latter did not consider the decisions of the Attorney General correct in point of law; and the Commissioner coincided with him in this, but said that the opinions of the

Attorney General would prevent the issuing patents on certain locations that he had declared illegal. Congress, he thought, would legalize the locations, and so prevent confusion, injury and trouble. The Secretary, he said, had not directed that the locations *should* be withdrawn, but only that they *might* be; and he presumed, he said, that the holders of them would wait to see what would be done at the next session of Congress.

Instr. and Opin., 822.

40. Such surveys, not conforming to the lines of the public surveys, had always been regarded as private surveys, and the law had so declared all surveys of incomplete French and Spanish grants. They were paid for by the parties, and they were entitled to and furnished with plats.

Act of March 26, 1804, for the disposal of the public lands in the Indiana Territory, § 13, 2 Stat. at Large, 282.

Act of March 3, 1807, respecting claims to land in the Territories of Orleans and Louisiana, § 7, 2 Stat., 441.

Act of Feb. 28, 1806, extending powers of Surveyor Gen., §§ 3, 4, 2 Stat., 353.

41. On the 26th of April, 1822, by an act to perfect certain locations and sales of public lands in Missouri, it was enacted that locations theretofore made of New Madrid warrants, if made in pursuance of the provisions of the act of 1815 in other respects, should be perfected into grants in like manner as if they had conformed to the lines of the public surveys. This remedied the error of the Attorney General in regard to the necessity that locations should correspond to these lines, which the law of 1815 had not said or hinted at, and never intended; but it did not remedy, upon the narrow and strict construction habitually misap-

plied to acts of grace and beneficent grants of *our* Government, the greater error, contained in his decision of 19th June, 1820, that sale of lands was not "authorized by law," until the sectional lines had been run.

3 Stat. at Large, 668.

42. Soon after the act of 1822 was passed, Elias Rector died, and on the 10th of October, 1825, Mr. Attorney-General Wirt made the still more singular decision that the phrase "*is* authorized by law," in the New Madrid act of 1815, meant "is authorized *now*, at the date of the passage of this act," and on the 4th of December, 1826, he made the same erroneous decision in regard to a pre-emption act. And as the lands on which this claim was located were lands of the Quapaw Indians, in 1815, and their sale was not *then* authorized by law, his decision avoided the location, although it was made in 1820, after the Indian title had been extinguished. These decisions were made in a case from Missouri and in one from Arkansas.

Instr. and Opin., 25, 28.

43. The act of 2d March, 1827, provided that the locations of land theretofore made according to law, by virtue of warrants under the act of 1815, should be perfected into grants in the manner prescribed by that act, if they did not exceed 640 acres to any one sufferer, any construction of the act of 1815 to the contrary notwithstanding.

4 Stat. at Large, 219.

44. But the efforts of Congress, not to amend defects in that act, but to overrule erroneous decisions made upon it, were always thwarted. The moment never came when a patent could have been successfully asked for under the location in this case; the General Land Office and Departments of the Treasury and Interior always maintaining Mr. Wirt's erroneous decisions, as they are gravely urged by the Government now.

45. In 1838 the Commissioner of the General Land Office and Attorney General decided that the act of 1827 confirmed the New Madrid locations of Peter Porier and Eloi Dejarlois, made in 1820, on lands composing part of the town of Little Rock, the Quapaw title whereto had not been extinguished until August 24, 1818; and the Secretary of the Treasury affirmed these decisions; although both claims were located on lands the Indian title whereto had not been extinguished in 1815, and neither was located in conformity to the lines of the public surveys.

But, on the 18th of September, 1839, the Commissioner of the General Land Office decided these locations void, because made on lands the Indian title to which was not extinguished until 1818; and on the 24th of that month the Secretary of the Treasury affirmed this decision.

Cunningham *vs.* Ashley and Beebe, 14 Howard, 377.

46. Finally, as late as 1851, and against our claim, a Secretary of the Interior reiterated the same absurd decision, that the sale of the land must have been authorized by law at the passage of the act, to make a location valid.

Chancery Record, p. 398.

47. Meanwhile, on the 20th of April, 1832, by the third section of the act entitled "An act authorizing the Governor of the Territory of Arkansas to lease the Salt Springs, in said Territory, and for other purposes," the Hot Springs, with four sections of land including them, were reserved for the future disposal of the United States, and it was provided that they should not be *entered, located, or appropriated* for any other purpose whatever.

4 Stat. at Large, p. 505.

48. Little Rock, the capital of the State of Arkansas, began to be settled in the year 1820, the lands composing it and in the vicinity west of the line of the Quapaw reservation,

made by the treaty of August 24, 1818, having then been surveyed. The Hot Springs lie about fifty-five miles southwestwardly from it.

49. The act of March 17, 1820, (3 Stat. 554,) authorized the appointment of a Register and Receiver for the Lawrence Land District; and in the latter part of 1820 those officers received testimony to establish pre-emptions south of the Arkansas river. On the 20th of November, 1821, the town of Little Rock was surveyed and laid out in blocks and lots. The seat of government of the Territory was removed to it from the Post of Arkansas by the act of the Territorial Legislature of 18th October, 1820.

50. On the 13th of June, 1823, the President proclaimed a sale of public lands south of the Arkansas river, which he did under the authority given him by the act of February 17, 1818, making provision for the establishment of additional land offices in the Territory of Missouri, (3 Stat. 406,) and by which he was *authorized* to open the land office for the Lawrence Land District, in the district or county of Arkansas, as soon as lands sufficient to warrant it should have been surveyed, and to direct, at any time, so much of the lands in that district as should have been surveyed according to law to be offered for sale; the only act which had been thereafter enacted on the subject being that of April 24, 1820, making further provision for the sale of the public lands, which did not affect the authority given by the former act.

2 Stat. at Large, 566.

51. The county of Arkansas was created by act of the Territorial Legislature of Missouri, on the 31st of December, 1818, and included all the country between New Madrid county and the Louisiana line; and the counties of Hempstead and Clark, in the Territory of Arkansas, were created

before the making of the said survey of the Langlois claim; and public surveys were in process of execution south of the Arkansas river preparatory to sale, before the treaty of 1818 with the Quapaws.

52. We are not aware of any recognition by the United States, by any formal act, prior to the treaty of 1818, of the title of the Quapaws to any lands; and there certainly never was any recognition in any shape of their title to any, except upon the river Arkansas.

53. In fact, the claim of title by the Quapaws to any country other than the narrow limits which they occupied, near and upon the Lower Arkansas, is rather imaginary. They had hardly the character of a people at all. *Du Pratz du Pratz*, in his *Histoire de la Louisiane*, published at Paris, in 1758, says that from Red River to the Arkansas there was no Indian nation. On Red River were the Natchitoches and Cadodaquioux. On Black River had been the Ouachitas, who gave their name to that river. These the Tchicachas had in great part destroyed, and the residue had taken refuge among the Cadodaquioux; also the Taensas had lived on the river since called Tensas, but they had taken refuge on the banks of the River Mobile.

The Cadodaquioux, now called Caddos, call themselves Cadohadacho. From them the River Caddo had its name, which runs into the Ouachita on the north side, and there is no doubt that the Indian title to the Hot Springs region was in these Caddos.

Du Pratz says: Four leagues from the confluence of the river *des Arkansas*, and on its banks, resides the nation which has given it its name. This nation is a pretty strong one, and the men are as good warriors as they are skillful hunters. The Tchicachas, (Chicashas,) always restless, undertook to try their bravery, but found them so valiant that they concluded not to continue the experiment of ascertaining their quality—above all, after the Kappas and a part of

the Illinois came among them, with the Mitchigamias. So there is no longer mention of Kappas nor of Mitchigamias, after they took refuge among the Arkansas, who adopted them, the whole together making but one nation. * * * Besides these Arkansas, [he says,] I can affirm, by being an eye witness, that on the banks of this river, and even to the Missouri, no other nation is met with.

Vol. II, 243, 245.

54. Yet the objection to the location of the claim of Langlois, that the sale of the lands on which it was located in 1820, was not authorized by law on the 17th of February, 1815, because the Quapaw title had not then been extinguished, with the other objections not removed by the act of 1822, continued to be maintained and insisted on by the Government, and was by the Commissioner of the General Land Office and Secretary of the Treasury at different times reiterated and applied, until the passage of the act of March 1, 1843, which will be hereinafter more particularly considered; and, as late as the year 1851, it was reiterated by Secretary Stuart of the Interior, as one of two reasons given for refusing a patent on this claim.

Chancery Record, p. 398.

55. In the Magnet Cove, which the geologist Featherstonhaugh pronounced to be the crater of an extinct volcano, and which is a few miles to the eastward of the Hot Springs, are immense beds of magnetic iron ore, which so affected the compass that by means of it the adjoining lands could not be surveyed, and they were in consequence, left unsurveyed until 1837. It being then determined to survey them, the Surveyor General for Arkansas ordered a re-survey of the Langlois location, the marks of the survey whereof, made in 1820, were partly obliterated, but in part still remained visible and legible; which re-survey was ordered by the Surveyor General, under general instructions of long stand-

ing, in order to close and abut the lines of the public surveys on the boundary lines of that survey; such re-survey of private surveys being always preliminary to surveys of the adjoining lands.

Instructions to John C. Hale, surveyor, 12th May, 1837. Testimony of Edward Cross, then Surveyor General, Record, pp. 287, 425, 316.

56. The Langlois location was accordingly surveyed anew by the deputy surveyor, (not by retracing the old lines, but by the original application,) and a new plat and field-notes, duly certified, thereof, returned by such deputy surveyor, dated February 28th, 1838, which was approved by the Surveyor General on the 23d of April, 1838, and transmitted to the office of the Recorder of Land Titles at St. Louis, where it was recorded on the 16th of June, 1838, and certificate of that officer granted and delivered to Rector, to entitle him to the patent.

Plat and field-notes of survey, Record, pp. 289, 294.
Patent certificate of Recorder, Record, p. 295.

57. As the statutes speak, in some cases, of the location and survey, so, in the office of the Surveyor General of Missouri, as appears by Exhibit A, Schedule F, (Record, pp. 368 to 413,) the *application* for a survey, designating the land selected by the party, was called the *location*, and the surveys were made, in a great number of cases, many years afterwards, as late, even, as 1846, 1856, and 1859. Therefore Rector supposed the survey of 1838 a valid one, having relation to the date of the application; and endeavored to obtain his patent upon it, in consequence of the established rule, not to give certificate of such surveys as his, until the adjoining lands had been surveyed, and their lines closed upon the lines of survey of the private claim, and plat of these surveys filed.

58. When this survey was returned to the office of the Surveyor General at Little Rock, it received no number. The Recorder of Land Titles numbered it 2,903, (the number of the original survey by Conway,) certifying by endorsement that the number was obtained by him from the Surveyor's office at St Louis, and inserted.

Record, p. 295.

59. But Rector's willingness to accept this survey did not avail him. For now not only the original objection of Indian title was in the way, but also the act of 1832, reserving the land for the future disposal of the United States; it being fancied to be the law that the provision in the act of 1822, requiring holders and locators of warrants, in locating them, to conform to the lines of the public surveys, and declaring that all warrants not located within a year should be null and void, made the survey in 1838, under an application and "location" in 1820, of no effect, and it not occurring to those who decided the matter, that this survey could have relation to the date of application. This just and equitable principle, simple and yet profound, never had a fairer case for its application. But regarding the date of the survey as the date of location, it was supposed that it could not be made after the passage of the reserving act of 1832.

60. Again, and as twice before, to overrule erroneous decisions and give effect to the original intentions of the legislative power, Congress legislated. By section 1 of the act of 1st March, 1843, "to perfect the titles to lands south of the Arkansas river, held under New Madrid locations," &c., it was provided that the locations theretofore made under the act of 1815, on land on the south side of the Arkansas river, if made in pursuance of the provisions of the act in other respects, should be perfected into grants in like manner as if the Indian title had been extinguished *at the time of the passage of said act.* The only exception to this general

provision was in the second section, that if any location had been *sold*, and the lands so located *appropriated* by the United States, the holders of the New Madrid warrants should have the right to locate them on other lands.

5 Stat. at Large, 603.

61. In the year 1849, after long investigation of the pre-emption claims, Rector still urging the issuance of a patent to him, the matter was referred to Mr. Attorney General Johnson, who, in April and May, 1850, decided that the petitioner was entitled to the patent, even under the act of 1843 alone, waiving all other grounds; and Mr. Secretary of the Interior Ewing sent the papers to the General Land Office, with directions for the patent to issue; but the pre-emption claim of the heirs of Ludovicus Belding, under the act of 1830, was thrust in the way, and the order for issuance of the patent was suspended; and in 1850 the whole matter came to the hands of Mr. Secretary of the Interior Stuart, who decided, first, that the location of the claim of Langlois was made on lands the sale of which was not authorized by law on the 17th of February, 1815; and second, that the act of 1832, reserving the Hot Springs from sale or entry, was not repealed or done away with by that of 1843, confirming all New Madrid locations south of the Arkansas river.

5 Opinions of Attos. General, 236, 237.

Report of the Secretary of the Interior, in answer to a resolution of the Senate relative to the Hot Springs of Arkansas, ordered to be printed Sept. 9, 1850, and forming Ex. Doc. No. 70, 1st Session 31st Congress; Chancery Record, 460, 461.

62. After which Rector filed ample proof of the survey of 1820, and asked a reconsideration by the Secretary of the Interior, who referred the whole matter to Mr. Attorney General Cushing, who decided that the first objection taken

by Mr. Secretary Stuart amounted to nothing, the location being valid if made on lands the sale of which was authorized by law at the time of location; but that the second objection was valid, if there had been no valid location of the claim prior to the passage of the act of 1832.

6 Opinions of Attos. Gen., 697.

63. In the year 1850, Rector had found that the plat and notes of survey made out and certified in triplicate, and all in his own handwriting, by James S. Conway, deputy surveyor, in 1820, and one copy of which had been by him deposited in the Surveyor General's office at St. Louis, and which had been, in 1832, transmitted with other papers to the Surveyor General's office at Little Rock, and there been received and kept, remaining there on file at least until 1838, were no longer to be found in that office, having in some manner been lost, destroyed, or taken away. Whereupon, on the 18th of June, 1850, he filed in that office the two other originals, furnished in July, 1820, by the same deputy surveyor to Hammond and Elias Rector, which were received on deposit in that office as private papers only; and in September of that year withdrew one of them, and filed it in the General Land Office, where it yet remains.

Certificate of Chief Clerk, Record, 283.

Testimony of Edward Cross, Record, 316.

Affid. of Lorenzo Gibson, Surv. Gen., 21 Jan., 1856: Record, 565.

Affidavit of Geo. A. Worthen, Chief Clerk: Record, 566.

64. The fact of which prior survey being represented to Mr. Attorney General Cushing, he advised the Secretary of the Interior that the documents in regard to that prior survey raised a question of fact, which, in justice to Rector, ought to receive the careful consideration of the Department; and he decided that, with the reservation of the fresh

points of inquiry thus presented, none of the claimants had a valid claim to the Hot Springs, and that the decision of Mr. Secretary Stuart ought to stand, unless, upon full examination of the new case presented in behalf of Rector, it should appear that he had acquired a title, under Langlois, of date anterior to the time when the land was reserved.

6 Opinions of Atts. General, 697 to 711.

65. When the Surveyor General's office for Arkansas at Little Rock was established, in 1833, and the same James S. Conway was appointed Surveyor General, there were transmitted to that office, from the Surveyor General's office at St. Louis, the papers, until then on file in the latter, in the New Madrid cases whereof locations had been made in Arkansas, with a schedule of such claims, showing No. of survey, No. of Recorder's original certificate, date of such certificate, No. of acres, or arpents, of claim, name of claimant, date of application for survey, names of applicants for survey, and location.

Copy of same, Record, 291.

Copy of same, duly certified by the Surveyor General of Arkansas, Record, 367.

66. Exhibit F, of the Surveyor General's office at St. Louis, whereof photograph copies are on file, in 24 folios, is a schedule of all the New Madrid claims located in Missouri and Arkansas. In this, in folio 22, appears the claim of François Langlois, Sr., as certificate 467, survey 2,903, without date of execution of survey or return to Recorder, and with the note, "Located in Arkansas, to cover Hot Springs." Date of location is stated to be 27 January, 1819.

Record, pp. 368 to 412.

Exhibit A, of the deposition of Hesse, is an extract from this exhibit.

Record, p. 360.

PRACTICE

IN REGARD TO THE NEW MADRID LOCATIONS.

67. After the act of 1816 went into operation, the Surveyor General's office had *all* the field-notes and plats of *all* claims, no matter in what office or where they had formerly been. The Recorder's office is still in existence in St. Louis, and there is not now, and has not been, in that office, since the act of 1816 went into complete operation, a single survey, or a paper purporting to be a survey, returned by the Principal Deputy Surveyor (whom the Surveyor General succeeded, in 1816,) or by the Surveyor General, of any New Madrid claim, Spanish grant or other private land claim. *All* such original papers are in the Surveyor General's office. And the notices and plats sent by the Surveyor General to the Recorder are not on file in the Recorder's office, but were sent to the General Land Office, and are on file there.

Test. of Hesse, Rec., pp. 353 to 356.

68. Where a party desired to locate a New Madrid claim upon unsurveyed lands, he filed in the office of the Surveyor General a written application, describing as well as he could by natural objects the land that he wished to locate, with a request for a survey to be made accordingly; and at the same time deposited with the Surveyor General his certificate from the Recorder of his right to locate. This application was filed in the office of the Surveyor General, who thereupon ordered a deputy surveyor to make the survey asked for; which, being made, was returned to his office.

Testimony of Frederick R. Conway, ex-Recorder of Land Titles. Record, p. 347.

69. This Court, or rather Mr. Justice Catron, in Bagnell vs. Broderick, 13 Peters, p. 436, was either misinformed when he sought for information at the General Land Office

in regard to the location of New Madrid claims, on which to decide the case, or else he misunderstood the information received.

70. The notice in writing which the New Madrid act required to be sent, with a plat of the location made, by the Principal Deputy Surveyor to the Recorder, was a notice prepared by the Principal Deputy Surveyor, and not all the descriptive notes of survey made out by the deputy surveyor, and which the plat filed with the Principal Deputy Surveyor accompanied. No *original* return of a survey was ever sent to the Recorder under the New Madrid act.

71. The practice, as proven by Frederick R. Conway, deputy surveyor, and clerk in the Surveyor General's office of Missouri, as early as 1819, Recorder of land titles from 1830 to 1845, and Surveyor General from 1845 to 1849, was as follows: The claimant filed his application with the Surveyor General, depositing there his certificate. A deputy surveyor was then ordered to make the survey and return it to the office. Afterwards, and as soon as the adjacent public lands were surveyed, the Surveyor General made out a *connected* plat, showing the private claim and the public surveys, with a copy of the field-notes of the private claim, and sent them to the Recorder of land titles. *He sent only a copy of the original plat to the Recorder.*

72. Hesse, custodian of the records of the United States surveys and deputy Recorder of land titles, proves that the original surveys of Spanish grants and New Madrid locations are all now among the archives of the late office of Surveyor General. We shall show the Court that in this the practice was in strict conformity to the law.

Record, p. 353.

73. Mr. Justice Catron gravely erred in a matter of fact, (and this error has been followed ever since,) when he said,

in Lessieur *vs.* Price, 12 Howard, 741: "The warrant or location-certificate issued from the Recorder's office; *and there it was returnable. There the plat and certificate were returned and recorded.*

74. For the certificate was *not* returnable there, and never *was* returned there; and the plats and field-notes were never returned there, and were never recorded there. When any record was made it was of a copy furnished by the Surveyor General, and the law did not even require a copy of the field-notes or description to be sent there, but only a copy of the plat, and a brief notice from the Principal Deputy Surveyor. If a copy of the descriptive notes was sent, this was, probably, because it was the most convenient mode of designating the land. And the practice of sending a *connected* plat was not exacted by the law. The intention of the law was to have just such a plat sent as was made out for a claimant under the French or Spanish Government, of his concession and no more, made out for him and paid for by him. The law meant that each New Madrid claimant might locate and have surveyed his land selected under the New Madrid act in the same way, with just such a plat, and get his patent on that plat. Moreover, the Deputy Surveyors rarely made out the *plats* in the field. These were made out in the Surveyor General's office, *after* the survey, from the field-notes, from which any body could make them. The Court will find a patent upon just such a plat and survey to Langdeau, in Langdeau *vs.* Hanes, decided at the last term.

Rec. of that case, p. 6.

75. From the year 1818 to the year 1838 the offices of the Surveyor General of Missouri and the Recorder of land titles were both kept in St. Louis, and but a short distance apart. Frederick Bates and Theodore Hunt, predecessors of Conway in the office of Recorder, did not record the plats of surveys of New Madrid locations sent them by the Sur-

veyor General. Nor did Conway during the early portion of his term. Afterwards he did. Neither was the time noted in the Recorder's office when New Madrid papers were received by the Recorder from the Surveyor General; nor did the recorder note the date of Recording the surveys in his office, nor the date of delivery of the patent-certificate of the claimant.

Testimony of Frederick R. Conway; testimony of Hesse: Record, pp. 355, 347.

76. Of the whole number of 516 New Madrid locations only 114 are recorded in the office of the Recorder of land titles. These were all recorded by Conway and Renard, two of nine who have held the office. Conway became Recorder in 1830. His predecessors recorded *none.*

Testimony of Hesse and Conway, Record, pp. 355, 347.

77. When the Surveyor General transmitted a plat of a survey to the Recorder showing the location of a New Madrid warrant, that survey was not questioned or inquired into by the Recorder as to its correctness; but the Recorder issued the patent-certificate in accordance with it, unless there was some discrepancy between the survey and the registry of certificates of new locations (rights to locate) issued by the Recorder under the act of 1815. If he found that the name of the claimant, the number of the warrant, and the quantity of land corresponded with the registry in his office, he issued the patent-certificate.

Testimony of Conway, Record, p. 348.

78. By the practice of the offices of Surveyor General of Missouri and Recorder of Land Titles a location was valid and perfect when a survey had been made, and was approved by the Surveyor General. No action upon it to make it complete, or for any other purpose, was had or taken, or

could be had or taken by the Recorder. And no length of delay on the part of the Surveyor General, in furnishing copy of the plat to the Recorder, affected or could affect the location or its finality.

Affidavits of Conway and Milburn, Record, pp. 346, 350, 352.

79. There were no plats of public surveys in the Recorder's office, nor any connected plats of private claims showing the connection with the public surveys. Therefore it was not possible for the Recorder to *locate* a New Madrid claim in his office.

Testimony of Frederick R. Conway, Record, p. 348; of Hesse, p. 355.

80. It was the invariable custom in the Surveyor General's office, where a private survey was to be made, to give the Deputy Surveyor written instructions. If a copy of the application was made out by the Surveyor General and delivered to the Deputy Surveyor, that of itself was sufficient authority to govern him in making the survey.

Testimony of Fred. R. Conway, Record, p. 348.

81. In twenty-two New Madrid cases that were on file at Little Rock, orders of survey were found in only two.

Affidavits of Willamouicz and Worthen, Record, pp. 328, 338.

82. And at St. Louis, orders of survey were not found among the papers on file in the cases.

Testimony of Hesse, Record, pp. 354, 357.

83. After the act of 1816 went into operation, which was, as Exhibit or Schedule F shows, before a single New Madrid location had been surveyed, the Recorder of Land Titles had no means in his office of ascertaining whether a New Madrid location reported to him covered a lead mine or

salt spring, or interfered with other claims or incipient titles; nor whether the notice of entry was in a form inconsistent with the laws of the United States; and this Court was mistaken in point of fact in Bagnell *vs.* Broderick, in supposing that he had the power and means to do it. It is singular that the attention of the Court has never been called either to the earlier laws, which explain the incoherency of the New Madrid act, and show the force and meaning of the provision chiefly misunderstood, nor to the act of 1816, creating the office of Surveyor General.

84. There are 516 New Madrid locations now on file in the late office of Surveyor General of Missouri; 495 located in Missouri, 21 in Arkansas.

Testimony of Hesse, and Lists, Record, pp. 354, 355, 293, 366.

Exhibit F, Record, pp. 368 to 412.

In seventy-seven of these cases the surveys were made after April, 1823, several in 1855, 6, 7, 8 and 9, and many after 1840.

Test. of Hesse, Record, p. 354; Exhibit B, p. 361; Exhibit F, Record, 368 *et seq.*

One hundred and forty-two of these surveys were reported by the Surveyor General to the Recorder of Land Titles subsequent to April, 1823.

Test. of Hesse and Exhibit C, Record, pp. 356, 363.
Exhibit F, Record, p. 368 *et seq.*

85. Nothing in the office of the Recorder of Land Titles distinguishes these cases from those where the surveys were made prior to April, 1823; and they have always been considered and treated as equally valid—as valid and binding locations—in that office and that of the Surveyor General;

and the Recorder *always* has issued patent-certificates on New Madrid locations, the surveys whereof were made subsequent to 1823. Of the 516 locations, patents have issued on 501; and patents have issued in cases where no surveys were reported to the Recorder, the accompanying surveys being obtained from the Surveyor General's office.

Test. of Hesse, Record, pp. 354, 355.

86. In all cases where the surveys are dated subsequent to April 26, 1823, the locations were made prior to that date, by application for a survey. In all such cases the survey *related* to the date of the application, and no patent was ever refused on the ground that the survey was made after the time within which locations could be made had expired.

Test. of Hesse, Record, p. 354, and Ex. F.

87. The Recorder of Land Titles took the relinquishment of the New Madrid claimant upon granting him his certificate of right to locate, and not on granting him his patent certificate.

88. And *all* the land in New Madrid county, to which there was any individual right, was held in 1815 by virtue of Spanish and French claims, and none of it patented. Langlois' was a grant, confirmed in 1805.

89. The Court of Claims has unanimously found and decided that the survey on the application of Hammond and Rector was ordered, made, returned to the Surveyor General's office, and there filed and numbered and registered. And that Court has not found *against* Rector any single fact alleged by him.

90. There has, indeed, been no attempt on the part of the

United States to disprove any one of the facts alleged, nor any attempt to show that the practice of the offices of the Surveyor General and Recorder of Land Titles has not been correctly stated by Frederick R. Conway and Hesse. Thus the only real questions in the case are those of law.

II.

ASSIGNMENT OF ERRORS.

The said Henry M. Rector says, that in the giving of the decree aforesaid, in the Record aforesaid contained, there is manifest error in this, to wit: That the said Court of Claims, as a Court of Equity of the United States, finding and perceiving that everything had been done that could be done by the said Samuel Hammond and Elias Rector towards the location of said New Madrid certificate of François Langlois, on the tract of land applied for by them, and that everything which remained to be done was made a statutory duty on the part of the officers of the Government, did, nevertheless, decide and decree, in deference to the former opinions of this Court, not made on the same state of facts, and inapplicable, that no location was ever made by the said Hammond and Rector, and that their representatives have no title, legal or equitable, to the land so applied for.

And there is also an error in this: That the said Court of Claims, as a Court of Equity, did dismiss the petition of the said appellant, and deny him the relief prayed.

And also in this: That the said Court below did give the decree aforesaid against the appellant in favor of the United States; whereas, by the law of the land, the same should have been given in favor of the said appellant, and against the United States.

Wherefore, and for other errors in the record and proceedings apparent, the appellant prays that the said decree may be reversed, and valid location of the said land decreed to have been made, and that he is the legal or equitable owner thereof, entitled to a patent therefor, and that he may be restored to all things that he has lost by occasion of the said decree.

III.

POINTS OF LAW.

Sec. I.

OF THE TRUE READING OF THE NEW MADRID ACT.

1. The first and cardinal rule of interpretation of the Act of 1815, if there be ambiguity or confusion in it, is that it is to be liberally construed, to make effectual the beneficent intentions of Congress.

Favores ampliandi, odiosa restringenda.

Beneficium Imperatoris, quod á divinâ scilicet ejus indulgentiâ proficisitur, quàm plenissimè interpretari debemus. (Javolenus, L. 3 ff. de Constitutionibus Principum. Dig., 1, 4, 3.)

Quælibet concessio fortissimè contra donatorem interpretanda est. (*Shepherd: Touchstone*, I, 87.)

Benignè faciendæ sunt interpretationes, ut res magis valeat quàm pereat.

In ambiguâ voce legis, ea potius accipienda est significatio, quæ vitio caret: præsertim cùm etiam voluntas legis ex hoc colligi possit. (Celsus, L. 19 ff. de Legibus. Dig., 1, 3, 19.)

Scire leges non hoc est, verba earum tenere, sed vim et potestatem. (Celsus, L. 17 ff. de Legibus.)

Quæ salubriter pro utilitate hominum introducuntur, ea non duriore interpretatione contra ipsorum commodum producenda sunt ad severitatem. (Modestinus, L. 25 ff. de Legibus.)

Rapienda occasio est, quæ præbet benignius responsum. (Paul, L. 168, princip. ff. de div. reg. jur. Dig., 50, 17.)

Qui ambiguè loquitur, id loquitur quod ex his quæ significantur, sensit. (Proculus, L. 125 ff. de Verb. Signif., Dig., 50, 16.)

These maxims, and many others, which it would be but pedantry to quote, are not of any one age or code. They are axioms as infallible here to-day as they were at Rome, because they are rules that flow from the immutable principles of truth, right, justice, and reason. We propose to accept them as guides, in the inquiry into the meaning and intention of the New Madrid act. They have not been heeded by the officers of the Government.

2. Two other significant maxims of the Roman law are these:

Calumniandi facultatem ex principali majestate capi non oportet: The faculty of resorting to perversions of law is not to be obtained by virtue of the imperial prerogative: which is a sentence of Paul. (Lib. V, Tit. II, § 4.)

Non tàm spectandum est, (Proculus said, in regard to Governors of Provinces,) quid Romæ factum, quàm quid fieri debet: It is not so much to be considered what is done at Rome as what ought to be done. (Dig. I, 18, 12.)

And one more, particularly applicable in matters as to which Secretaries and Heads of Bureaux, Attorneys General, and Solicitors make much law, is:

Subtilitatis legum jùdex curans gerat, nihil his quæ contra leges dìcta fuerint à Principe attendens: Let the judge take upon himself the care of the fine distinctions of the law, paying no attention to what has been said by the Emperors contrary to the laws. (L. 11, Code, VII, 45.)

The United States must not resort to any ground of defense against any of these claimants that hath not in it the highest equity. It must not convert what was at first but an error of its officers into a fraud *ab initio*, by insisting upon retaining the benefit or advantage gained by it. Nor is it permissible to the Government to resort to the *apices juris* to defeat claimants. *Summa jus summa injuria* is more

often true than is supposed; and however it may be here, the Government is often more disgraced by the objections and cavilings of officers, legal and clerical, of the Departments, than by mere fact of delaying and denying justice, which the objections aggravate.

What the land here in controversy may or may not be worth it is not for the Court to know. The questions of law and right are the same, whether it is worth a thousand dollars or a million. If the Court had a right to know its value, it would inquire what it was in 1820, when, if it is ours, it became so. The United States have done nothing to increase its value, and the improvements there have been created by those who contend here with each other and the Government for the title.

3. Two facts must have a material influence in this inquiry, and be kept steadily in view. They furnish the key to the intention of the Legislature. 1st. At the date of the passage of the New Madrid act, not a foot of land had been surveyed, under the general system of surveys, in what was then the Missouri Territory. 2d. The lands of settlers injured by earthquake were held by virtue of French and Spanish grants, each surveyed by itself, and of various sizes and shapes; and unless the lands which they were authorized to select in lieu thereof were to be selected and surveyed in like manner, the time when a sufferer could secure other land was entirely uncertain, and the law a mere delusion.

4. The filing by the claimant of a notice in writing and plat, required by the act of March 2d, 1805, § 4, (as it had been required by act of March 3, 1803, § 5, in regard to land south of Tennessee; by act of March 26, 1804, § 3, in regard to lands in the Indiana Territory, and was required by the act supplementary to this, of March 3, 1805, § 5, 2 *Stat.*, 230, 278, *and* 344,) was not a step in the process of *location* of a French or Spanish incomplete grant. It had

nothing to do with location, for that was already complete. Equally, the notice and plat were to be filed by the Principal Deputy Surveyor, when the location of a New Madrid claim was complete, and the party entitled to a patent.

The French and Spanish incomplete grants were surveyed at the expense of the owners, and held and considered as private surveys only.

Act of February 28, 1806, 2 Stat., 352.

So claims under British grants were surveyed at the expense of the owners, (act of 3d March, 1803, § 11, 2 *Stat.*, 233,) and purchases in the Indiana Territory, (act of March 26, 1804, § 13, 2 Stat., 282.)

Consequently, the party was entitled to copies of plats and notes of survey. It was intended that locations under the New Madrid law should be made by like survey, but this to be directed by the Principal Deputy Surveyor. The new location in lieu of an injured tract could be made in any shape the party pleased. The law gave no directions as to that. When by the survey, the location had been made, the party was to have a certificate that he was entitled to a patent, and the Surveyor General was to send to the Recorder a copy of the plat and a notice in writing, (as the party was required to do in case of a French or Spanish grant, where the plat was in his own possession,) not to complete the location, but to enable the party to have the benefit of the location made, and the patent to which he was entitled.

5. What was to be a "location made" the law itself distinctly defines. If its language were ambiguous, it would, if possible, be so construed as not to conflict with the general law, that when a location is necessary it is made by a survey, returned to the office, where it is to be accepted as conforming to law and instructions, and to be retained as a survey duly made. There is really no ambiguity. The

location was to be made by the Principal Deputy Surveyor, or under his direction, whose duty it was made to cause a survey, and that this survey was the location is clear from the further provision that he should return *a plat of the location made* to the Recorder, with a notice in writing designating the tract *thus* located. The party was to be entitled to his patent upon the original certificate being issued and *the location made;* and surely the location had been made when the Surveyor General sent to the Recorder a plat of *the location made*, and a notice designating the tract *thus* located. This portion of the statute is too plain and clear to permit construction.

6. The meaning and intention of the New Madrid act was that the first certificate that the party was entitled to a patent should be given by the Principal Deputy Surveyor; and this appears from the act of March 3, 1807, § 6, which, with slight adaptations, the *redacteur* of the law evidently meant to copy, and did use its precise language. Misplacement of paragraphs, or the omission of words by clerical misprision, have made sections 2 and 3 incoherent; but the intention is plain enough.

2 Stat. at Large, 440.

7. It follows that as the certificate to be given by the Surveyor General was to be evidence for the party that he was entitled to a patent, the location was complete before it was given, and nothing more remained to be done to entitle the party to the patent. To send to the Recorder a notice of the location made, designating the tract located, and a plat of the location, was no part of the process of location, but subsequent to it, and official infirmation of it; and the neglect to perform this official duty would not prejudice the party, who had done all that he could do in the premises.

8. In the language of the Court of Claims, "Everything

had been done by the parties which the law required them to do, and everything which remained to be done was made a statutory duty on the part of the officers of the Government. The parties were without legal means to compel the Surveyor General to act by transmitting the plat and notice to the Recorder; and things which the public officers ought to have done are to be regarded as having been done."

9. The "notice in writing" required to be sent by the Principal Deputy Surveyor to the Recorder of Land Titles neither was the descriptive notes of the survey, nor was required to contain them. It was merely information that such a party had located his claim by survey, on such a tract, as shown by the plat; and it was no more part of the process of location than was the filing by claimants under British, French and Spanish grants of notice of their claim, and a plat.

Act March 3, 1803, § 5, 2 Stat., 230.
Act March 26, 1804, § 3, 2 Stat., 278.
Act March 3, 1825, § 5, 2 Stat., 344.
Act March 2, 1805, § 4, 2 Stat., 326.

10. The "surveys" of New Madrid claims were the descriptive notes and plats of the Deputy Surveyor who ran and marked the lines on the ground. These were never intended to be, and never were, nor ever could be, lawfully returned to the Recorder of Land Titles. They were to be returned to the office of the Principal Deputy Surveyor, by whom they were deemed in law to have been made, and by whom they were approved, accepted and recorded. He alone could certify copies of them. By the act of February 28, 1806, (2 Stat., 352,) no other plats were to be filed with the Recorder than those of lands surveyed *prior* to December 20, 1803, and under the act of April 29, 1816, providing for the appointment of a Surveyor of the public lands

in the Territories of Illinois and Missouri, *all* plats of survey, wherever they were, were to be delivered to such Surveyor, who was to transmit to the Registers general and particular plats of all lands surveyed, and copies of the same to the Commissioner of the General Land Office; to record all surveys executed by his deputies, and certify plats of survey to be admitted as evidence in the courts.

11. The Recorder had *nothing* to do with making the location. He passed on the question of the party's right to select and have other lands, and gave the official evidence of the *right* to locate. Then he had nothing more to do with the matter until the evidence came to him, by the copy of the plat and the notice of the Principal Deputy Surveyor or Surveyor General, *that the location had been made.* Then he had simply to perform the ministerial duty of issuing the patent-certificate. After the act of 1816, it was useless for him to record plats, copies of which he could not certify; and sending the notice and plat to him by the Surveyor General was no more necessary to complete the *right* to a patent, than sending a certificate of purchase by a Register to the General Land Office, is in the case of a purchaser, to complete his right. Each is but the measure of routine by which an officer is to enable a party to have final and plenary evidence of a right and title, completely perfect, and vested without it.

12. There is nothing in the world in these New Madrid claims, in the act of 1815, or in anything, anywhere, connected with them, that made inapplicable to *their* survey and location the settled rules of law, universally agreed to, in regard to the selection and location of lands under warrants or other evidences of right to select and have lands out of the common mass. The law is not ambiguous, in regard to what is to constitute a location. If it were, and there could be a doubt whether, not only the survey and its return to,

and acceptance by, the Surveyor General, but also the return by him, at his leisure, of a notice and copy of the plat to the Recorder of Land Titles was part and parcel of the making of the location, although the plat was to be "a plat of the location made," and the notice to designate "the tract thus located,"—if, we say, there were ambiguity, this Court would never accept a construction that would make a party liable to lose a right by the neglect or fault of an officer, over which he could have no control; that would be directly contrary to the general law in regard to locations by survey, as uniformly expounded by itself and every other respectable American court since the settlement of the Continent; that would directly tend to defeat and render nugatory the beneficent intentions of the Government, and that would be contrary to the great axioms of construction. The words, "location made by the Surveyor, who shall cause a survey to be made, and return a plat of the location, and a notice designating the tract thus located," are too plain for anybody to mistake their meaning, if he does not look over them at something that the imagination sees far beyond, and so fail to catch their sense and meaning.

13. Now, that old, well-settled, and reasonable law, as defined by this Court long ago, is that the validity of a survey does not depend on its being recorded; that a grant for so much land "*is located* by a survey made by a proper officer;" that the title to specific land under such a grant rests upon a designation of it, accompanied by a survey or description made by the Surveyor General; and that, in the cases of Spanish grants, where, on certificate and plat being filed with the Register or Recorder, patent certificate was to be issued by him, the *survey* completed the right to a patent.

Stringer *vs.* Young's Lessee, 3 Peters, 320.
Smith *vs.* The United States, 10 Peters, 333.
West *vs.* Cochran, 17 Howard, 413.
Kessel *vs.* St. Louis Pub. Schools, 18 Howard, 25.

Where there was a confirmation by Commissioners of a Spanish grant to so much land, the location and title were complete when the land was surveyed, and the survey approved at the Surveyor General's office as a proper one.

Cousin *vs.* Blanc's Executors, 18 Howard, 210.
Bryan *vs.* Forsyth, 19 Howard, 334.
Lessee of Lewis *vs.* Meredith, 3 Wash. C. C., 84.

Everywhere and always it was held that where a warrant gave a right to a certain quantity of land, to be fixed and located at a future day by a survey, there was a location *when the survey was made and returned.*

Lessee of Lewis *vs.* Meredith, 3 Wash. C. C., 84.
Dubois *vs.* Newman, 4 Wash. C. C., 77.
Holtzapple *vs.* Phillibaum, 4 *Id.*, 356.
Gardner *vs.* Sharp., 4 *Id.*, 609.
Penn *vs.* Ingham, 3 *Id.*, 90.
Brown *vs.* Arbunkle, 1 *Id.*, 484.

And the marks made on the ground, the *actual* running and marking, make the survey.

Conn *vs.* Penn, 1 Peters C. C., 496.

14. When a survey was made, no matter at what length of time after filing the application designating the lands and asking a survey, the survey *related* to the date of the application, when this would not prejudice any *bonâ fide* title or right in another that had intervened. As against the United States, the survey of one of the claims, made in 1859, *related* to the date of the application, filed prior to 1823, as if it had been made on the day when that was filed. All the several parts and ceremonies necessary to complete a conveyance are taken together *as one act*, and operate from the substantial part by relation.

Jackson *vs.* MacMichael, 3 Cowen, 75.
Caroley *vs.* Wallace, 12 Missouri, 145.
Lands *vs.* Brent, 10 Howard, 373.

This doctrine has its simplest possible application in cases of lands claimed by warrant and survey. The survey *gives effect* to the selection. It is the *realization* of it, and but for the just effect of *relation* fraud would thrive, and a junior selection, with a survey sooner made, would take the land from the older applicant, because the surveyor chose to delay his survey.

15. This Court has not intended, it *cannot* have intended, to depart from these principles. It could not destroy them if it had. Undoubtedly, this mere *application* to locate, or for a survey, in these New Madrid cases, where survey was necessary to establish the bounds and limits of the land, was not, if no more followed, a location. It was so called, and in a certain sense it was so, because the survey, simply obeying it, only ascertained the limits and fixed the locality of the land, to which the application gave the party a right. But if it remained unexecuted by a survey, it was merely idle and ineffectual for any purpose. If a decree for the land, described as in the application, were given, its location and limits to be settled by a survey, it would be the decree, when the survey had been made, that would give the title; though, without the survey the land would never be severed from the general mass.

16. Where a survey was necessary it was to be applied for and paid for by the party. It was a private survey; the plat and field notes were *his;* the United States permitted its officer to make the survey for *him*. If, therefore, he did not follow up his application by procuring the survey to be made *and returned*, he did not sever any particular body of land by fixed, defined and specific limits from the public domain. But he had done so when he had had the survey properly made, in accordance with his application, and when it had been decided to have been so made, by the officer to whom that power was given by law, and that officer

had accepted it, and placed it where the law required it to remain.

17. In the very nature of things this made the location complete. It could not continue incomplete, until some public officer performed some ministerial duty, imposed on him by law, and the doing whereof in no degree depended on the party. Of course, the law, being in that omnipotent, *could* enact that the location should not be deemed complete until that duty had been done, but this would be so contrary to what the wisdom of ages has settled as the law that it could only be made law by the most express words; and if any room were left for doubt it would not be deemed to have been the intention of the legislator. No such law will ever be established by the ingenuities or pedantries of construction; nor, where there is ambiguity, in favor of the Government, to enable it to defeat its grants, when it was in its power, if it would change the law and set reason at nought, to speak plainly.

18. There is nothing in the New Madrid act to indicate that any other than the three ordinary steps were requisite to perfect a right to patent under it.

First. The application to locate and for a survey.

Second. The actual survey.

Third. The return to the office, where such surveys are kept and belong, of the plats and field-notes, which are the *evidence* of the location; and the approval and filing of the survey there.

This Court has never said that anything more was necessary to perfect a location. It has only been misinformed as to the place and office to which the "surveys" were returnable, where they were to be filed and recorded and remain, and whence copies were to be procured. Even in the case last decided it is plain that the Court supposed that the *sur-*

veys were to be returned to the office of the Recorder of Land Titles.

Mackay *vs.* Easton, 19 Wallace, 619.

19. If the survey had been lost or destroyed on its way to the place of return, the location would none the less have been made. It would be the common case of the loss of *evidence*, which could be supplied.

20. By the very words of the law, the Principal Deputy Surveyor *made the location.* By his mandatary, the Deputy in the field, *he* located the claim by making the survey. If his *approval* of it was necessary, it is presumed, by his having received and numbered it, and permitted it to be filed and registered; as also this proves that he directed it; or, being a ratification, *mandato æquiparatur*, and moreover, that approval, like any other ratification of the act of an agent, retroacted, and made the location complete from the date of actual survey. And when the survey had been returned to him, to his office, and approved, his subsequent neglect to furnish any other officer the *evidence* of it could not unmake the location.

21. And upon a universal principle of law the survey *related* to the date of the application and became one thing with it.

22. Under this act a location was effected precisely as it was under former laws, by the *survey* returned to the Principal Deputy Surveyor or Surveyor General. Where the law said, Patents shall issue on presenting such surveys to the Secretary of the Treasury, together with a certificate of the Register that the land is not rightfully claimed by any other person; or the Surveyor General shall transmit plats to the Register or Recorder and to the Secretary of the Treasury, and the Register or Recorder shall issue a certificate which

shall entitle the party to a patent, it was not supposed that the location was not made and completed by the survey.

Acts, 2 March, 1805, § 8, 2 Stat., 329.
21 April, 1806, § 2, Stat., 395.
3 March, 1807, § 6, 2 Stat., 441.
12 April, 1814, §§ 3 and 4, 3 Stat., 122.

23. We do not think that this Court has ever intended to hold that the return of the survey to the office where it is to belong, to be received, filed, recorded, approved, made a finality, is not a completion of the location. That it is, although plat and notice are to be sent to the Register or to the Recorder of Land Titles, is proven by the fact that at the same time a copy was to be sent to the Secretary of the Treasury or General Land Office. Mr. Justice Catron, to obtain the material for judicial decision in Bagnell *vs.* Broderick, sought information at the General Land Office as to the practice in New Madrid cases, which was matter of fact. That this was of doubtful propriety is evident from the fact that no opportunity was allowed the party to whose injury the information was used to show that the practice had been otherwise; and from the fact, which is proven in this case, that the information given *was* erroneous, and the practice not as it was stated to be.

24. All the cases in this Court that are relied upon against us have proceeded upon this original error. It is fortunate that an erroneous judgment always has in its bosom the seeds of evil consequences which at length become not only apparent but intolerable, and then it becomes possible to explode the original error. The cases to which we refer, and which we comment on in the argument, are:

Bagnell *vs.* Broderick, 13 Peters, 436.
Stoddard *vs.* Chambers, 2 Howard, 284.
Barry *vs.* Gamble, 3 Howard, 32.
Lessieur *vs.* Price, 12 Howard, 60.
Hale *vs.* Gaines, 22 Howard, 144.
Rector *vs.* Ashley, 6 Wallace, 142.

And these have been succeeded by Mackay *vs.* Easton, (19 Wallace, 619,) in which the Court, disquieted by consequences that offended the reason, and conscious that there was some radical error in the former decisions, and yet not discovering it, has in its perplexity laid down distinctions in regard to locations that are in substance sound, and which sustain our title to the Hot Springs.

25. We might, with entire confidence, rely upon the proposition that no case has hitherto been before this Court in which the party *could* not procure the transmission by the Surveyor General to the Recorder of Land Titles of the plat and notice required by the New Madrid act to be returned to him, and in which the Surveyor General refused to do so, or was forbidden to do so by his superiors. The former decisions may all stand, and yet this new fact, presenting a different case, wholly avoids these decisions, by means of the settled doctrine of the Court, that no man can suffer by such wrongful refusal or prohibition, and that what the officers of the Government should have done and did not do should be considered as done.

We *do* rely upon that. It is conclusive. But we prefer not to rest our case upon it alone, though learned counsel admonish us of our presumption in endeavoring to demonstrate that this Court has heretofore, not by its own fault, fallen into error.

26. This Court has expressed the opinion heretofore that the New Madrid act contemplated an exchange of lands. In a legal sense this is hardly correct. The act of 1815 provided that upon the location of other lands, the injured land should revert to and vest in the United States. This could be effected without conveyance, because all such lands were held by French and Spanish grants, and the United States had made no title. No relinquishment was necessary. The *law* required none. But officials are generally inclined to consider that they can mend the law's defects,

and the Recorder of Land Titles, thinking that Congress had by oversight omitted to require relinquishments, invested himself with the powers of Congress, and legislated to remedy this oversight.

An exchange of lands is *of the nature* of a contract of sale. Each party is both buyer and seller, and each warrants against eviction and incumbrances.

Permutatio vicina est emptioni.

Paul, citing Aristo, L. 2, ff. derer. permut. Dig., 19, 4, 2.

In permutatione discerni non potest, uter emptor, uter venditor sit.

Paul: L. 1, § 1, ff. de contrah. empt. Dig. 18, 1, 1, 1.

Pothier: Traité du Contrat de Vente, Nos. 618, 620, 621, 623.

Permutatio ex re traditâ initium obligationi præbet. Ideoque Pedius ait, alienam rem dantem, nullam contrahere permutationem.

Igitur ex alterâ parte traditione factâ, si alter rem nolit tradere, non in hoc agemus ut interest nostra illam rem accepisse de quâ convenit: sed ut res contrà nobis reddatur, conditioni locus est, quasi re non secutâ.

Dig., 19, 4. L. 1, §§ 2, 3, 4.

Permutationem vicem emptionis obtinere non est juris incogniti.

Code: 4, 64, 2.

27. The Court held, in Lessieur *vs.* Price, that there must be a concurrent vestiture of title, and that the injured land must have vested in the United States at the time that title was taken by the new location; and it has held a location invalid where there was no relinquishment. The provision of the New Madrid act that upon a location made in lieu of the injured land, that should *revert* to and *become absolutely*

vested in the United States, would seem to exclnde the necessity of relinquishment by conveyance, by the very force of the language used. But the land of Langlois *was* relinquished to the United States by formal conveyance more than half a century ago. In every exchange there must be mutuality, and whether the law contemplated a technical exchange or not it may well be argued, upon what the Court has said, that, *è converso*, the title to the land applied for and surveyed must have vested in Hammond and Rector at the time when the United States took title to the injured land by the relinquishment.

28. We lay no undue stress upon this notion of an exchange, and upon the fact that the United States have had for fifty years, upon that theory, the consideration which was given for the land located by Hammond and Rector. We admit that the United States agreed only to give us such land in exchange for the injured land as we should select and locate according to law, making our location perfect according to law, and that if we selected land not subject to location, or have failed to take the necessary legal steps to perfect our location, we have no right to demand of the United States that they shall give us title to this land, although they have ours.

29. But, as Hammond and Rector paid $640 for the certificate granted to Langlois, and Rector $600 for the undivided half of it, which at compound interest for fifty-five years would be a large sum, the United States, having Langlois' land, cannot be permitted to avail themselves of any inequitable grounds to defeat our title; and certainly cannot have any advantage of either the erroneous decisions of their high officials, if these prevented the perfection of our title, by transmission of the plat and notice to the Recorder, (if that *was* necessary to its perfection); nor of the failure of

their Surveyor General to transmit them, if it was his duty to do so.

Lytle *vs.* The State of Arkansas, 9 Howard, 314.
Taylor & Quarles *vs.* Brown, 5 Cranch, 241.
Commissioner General Land Office, Instr. and Opin., 639.
Craig *vs.* Bradford, 3 Wheaton, 494.
Stringer *vs.* Lessee of Young, 3 Peters, 338.
Castellero's case, 2 Black, 97.
Glasgow *vs.* Hortiz, 1 Black, 601.

30. The United States cannot release themselves from any obligations that equity creates. They may avoid performance or compliance, but the obligations will nevertheless remain. Holding the injured land, could they, by means of the reservation act of 1832 prevent Rector from perfecting his location by a new survey, if one had been necessary? any more than they can now rely on the failure of the Surveyor General to do what he was ordered by his superiors not to do? These are defences, and these are arguments, too, to which in such a case the Government cannot creditably resort.

Esse enim hanc quæstionem de bono et æquo; in quo genere plerumque sub auctoritate juris scientiæ perniciosè, inuit, erratur. Et sanè probabilis hæc sententia est, quam uidem et Julianus sequitur.

Paul—quoting Celsus: Dig. 45, 1, 91, § 3.

31. The reservation act of 1832 is not at all in the way of this claim. It could not affect our title, if the location made in 1820 was complete and valid. The Government's own act, reserving the lands from sale, cannot be its muniment of title to retain the land which was selected and surveyed in lieu of that relinquished. For what was the act of 1832 but a mere declaration that the United States would hold and not sell the land?

Sec. 2.

FILIATUM AND EVIDENCE OF TITLE; AS TO THE FACT OF THE SURVEY, ETC.

32. The first instrument given by Langlois to Story was actually a conveyance. It was a power to locate for his own benefit, and that alone would make it a conveyance in equity. In fifty such cases, upon like powers given in Arkansas, upon what were known as Lovely claims, under an act of 1828, legal title has been decreed by the courts of equity. The power here was coupled with an interest, was therefore irrevocable, was expressly declared to be so, and gave power to sell the land located, and to relinquish to the United States the injured land. And the deed of Langlois and wife ratified the power and conveyed the land.

33. All the conveyances in this case are ancient ones, admissible as evidence without proof of execution; and moreover, no one of those whose interests are affected by them is here contesting them or denying them.

34. The rights of assignees are recognized by the acts of 26th April, 1822, and March 1, 1843; and assignees have been always deemed to be the "legal representatives" of the original parties.

Instr. and Opin., 2, 3, 83, 395, 740, 5, 741.
Galt *vs.* Galloway, 4 Peters, 339.
Lessee of French *vs.* Spencer, 21 Howard, 226.

35. Elias Rector has been dead more than *fifty* years. The certificate and claim have been in his hands and possession, and those of his son, for one half a century. If any conveyance of Langlois, Story, or Hammond is imperfect, or not fully authenticated, or if any one is wanting, all that has been done will be presumed to have been rightfully

done; and any necessary deeds or assignments will be presumed to have been made.

Strother *vs.* Lucas, 12 Peters, 452, 411.
Lewis *vs.* Baird, 3 McLean, 57.
Hepburn *vs.* Auld, 5 Cranch, 262.
Mitchell *vs.* The United States, 9 Peters, 712.
Stoddard *vs.* Chambers, 2 Howard, 316.

36. And any claims of any of these parties and of all persons claiming under them, will be deemed to have been abandoned, and the title of Rector to be rightful, under valid sales and cessions. It is too late to impeach these now.

Strother *vs.* Lucas, 12 Peters, 452.

37. It is proven that the order for the survey was given. Such orders were simply instructions to the surveyors, and were not preserved. If it were not proved to have been given, it would be presumed.

38. A survey is made by a surveyor under oath, and is evidence as to all things that are properly within the line of his duty.

Elliott *vs.* Pearl, 10 Peters, 441.
Russell *vs.* Transylvania University, 1 Wheat., 432.
Craig *vs.* Bradford, 3 Wheat., 594.
Taylor & Quarles *vs.* Brown, 5 Cranch, 234.
Lessee of Harris *vs.* Buchan *et al.*, 1 W. C. C, 191.
Griffith *vs.* Bradshaw, 4 Wash. C. C., 171.

39. When the survey of the Langlois location had been made by the Deputy Surveyor, Rector and Hammond had a right to receive a copy of it. It was made in triplicate, and one of the parts was lodged in the Surveyor General's office, and the others retained by themselves. These origi-

nals were found precisely where they belonged, in the custody of Rector, and in 1850 he lodged them in the office of the Surveyor General of Arkansas. If that which had been in the office had not been lost it would have been of no higher dignity, nor more authentic.

40. That the protocols of the survey were in the possession of Rector in 1850, and have come from his possession, is the best proof of their genuineness. That is established *prima facie* by showing that the document comes from the proper custody, from the place and person where it might reasonably and naturally be expected to be found; from the custody of one who had an interest in keeping and preserving it.

1 Greenleaf Ev., § 142.

Bishop of Meath *vs.* Marquess of Winchester, 3 Bing. New Cas., 183.

Neale *vs.* Samples, 8 Ad. & Ell., 151.

Sec. 3.

WHY THE NOTICE AND COPY OF PLAT WERE NOT SENT TO THE RECORDER.

41. After the receipt in July, 1820, by the Surveyor General, at St. Louis, of the opinions of the Attorney General, and the instructions of the Commissioner, he could not give to Hammond and Rector a certificate that they were entitled to a patent, nor send to the Recorder of Land Titles a copy of the plat and a notice informing him that certificate 467 had been located by survey on the tract of land shown by the plat, nor send a copy of the plat to the General Land Office, for he had explicit instructions not to recognize such a location as valid. But he had directed the survey, the parties did not withdraw their application, and they had a right to decline to do so, and to wait and see

if Congress would correct the errors of the Attorney General. The Surveyor General believed such locations valid, or, at any rate, that the decisions were erroneous, and he placed the survey on file and the case upon the list as located by survey No. 2,903. If it was a valid survey and location, to the completion whereof transmission of plat and notice to the Recorder of Land Titles was necessary, then the Government, having by erroneous decisions of its officers prevented that, cannot be heard to urge it here against us.

42. The survey made in 1838 would have been perfectly legitimate, if it had been a re-survey, retracing the old lines, or if they could not have been found. If there had been *no* survey until then, the question would have arisen whether it could then be made, the reservation act of 1832 prohibiting any location of the Springs. It was decided by the Attorney General that it could not; but the real point on which the question had to turn, the real question in fact, was not even mentioned, to wit, whether the United States could prevent, by the reservation, a survey being made upon the application filed in 1820, and which, when made, would relate to its date. Many had been made, and were made afterwards, until 1859, all of which were deemed to relate.

43. But the new survey was not made for the purpose of location; it was made by order of the Surveyor General to establish the lines of the private survey, and close the lines of the public surveys on them, and it should not have varied from the lines of the old survey.

Sec. 4.

OBJECTIONS TO THE VALIDITY OF THE LOCATION.

43. It was said in the court below that it was indispensable that the *order* for the survey should be in writing; but

there is ample evidence that, generally, no formal *orders* were given at all, in the New Madrid cases. No law required that the order should be in writing; that there should be one was never essential to the validity of any survey. The law only provided that when the application for survey of a New Madrid claim should be made, the location should be effected by a survey made by the Principal Deputy Surveyor, or under his direction. An oral direction was therefore sufficient, and, if an order in writing had been necessary, it would be presumed that it was given, because the Deputy made the survey.

These principles are too elementary to require support by array of authority.

44. It was also insisted by the learned counsel of the Government below that if the location gave any right it was lost by inaction.

There are no facts, upon which any presumption of abandonment can be raised. Shortly after the survey, the claimant's father died, leaving a widow and infant children. Except the claimant, these children died in infancy. If it were honorable, creditable, decent, or allowable for the United States to claim a forfeiture by inaction, they could not do so against infant children.

45. Nor do the facts warrant any presumption of fraud in regard to the original survey. The learned counsel for the Government in the court below said that this survey "*was not heard of until* 1855."

As the Chief Justice of the court below inquired, why was it numbered? Why did that made in 1838 bear *the same* number? and why was it placed in schedule or exhibit F, and on the list sent to Little Rock, *long before the new survey*, as "SURVEYED, No. 2,903?"

a. When Rector's father died the survey could not be

recognized as constituting a valid location. Orders from the highest power forbade it. In 1835 the claimant was about nineteen years of age. In 1838 the new survey was made. He has prosecuted the claim persistently ever since.

b. That survey was made by order of the Surveyor General. A plat of *it* was sent to the Recorder. Rector had ample reason to believe it a good and valid survey on an application made in 1820. This is abundantly shown by the lists of New Madrid claims and locations, and the dates of other surveys.

46. As to the *fact* of the survey there is no doubt. Woodward proves that it was generally known of. Physick was told of it almost immediately after it was made. The old marks prove it. The survey returned and placed on the lists and numbered proves it, *and proves itself.* It was certainly *applied for* in proper form. That is not denied. Then it was the *duty* of the Surveyor General to direct the survey. When it was returned he received it as a correct *survey*, made by his direction; as *such* he approved it. That entitled the Deputy to his pay. *No instructions forbade such a location when the application was made.* Therefore the Surveyor General properly and justly adopted the survey *as his own*, as if made by himself. But, under his instructions, he could not issue a certificate certifying that by this survey, no matter how regularly and properly made, the land was located: he could not *act on it* as a location. It was not for *him* to *approve* or *disapprove* it *as a location.* Whether the particular land could be located was a question of law, not for him to decide, even if a higher power had not already decided it. So that all the talk about his *not approving the location* or *the survey* is mere babble.

47. Always and everywhere before, an application for a survey and a survey made, constituted a complete location. *They do so in the very nature of things.*

Says the learned counsel of the Government below, Congress prescribed *a new mode of location* for New Madrid claims. Not so; it *said* what the location was to be; it *defined* the location in the law, and the only *mode* that it prescribed (for it only *recognized* the universally established mode of *effecting* a location) was the mode of getting the patent—how, when the location was complete by the survey returned to the Surveyor General, the party *might* get his patent. No new requisites are enacted, necessary to complete *the location.*

48. Six objections have at various times been set up against this location. There never has been a time when some one or more of them has not been standing in its way, preventing our obtaining a patent. So that there never has been a time since the decisions of Mr. Wirt reached St. Louis, in 1820, when an effort to obtain a certificate entitling the claimant to a patent, or to have the plat and notice, under the survey of 1820, forwarded to the Recorder of Land Titles could have succeeded.

We insist that not one of these six objections ever had any validity or any support in law or fact, and that all the time the means of obtaining a patent have been wrongfully withheld from us.

First Objection.

49. That locations of New Madrid claims could be made only upon lands that had been directed to be surveyed, for the purpose of being offered for sale at St. Louis; the act of 1811 directing that the lands *so surveyed* should be offered for sale.

Second Objection.

That lands which the President had not directed to be prepared for sale, were not lands the sale of which was authorized by law.

The first of these was interposed in advance of the location, on the 10th of July, 1816, by instructions from the Commissioner of the General Land Office to the Surveyor General at St. Louis.

Instr. and Opin., 820.

And the second, on the 15th of April, 1817, by letter from the same to the same.

Instr. and Opin., 815.

These were one and the same objection; the attempt to limit the location of New Madrid claims to the lands that were to be sold at St. Louis resting on the fact that these were the only lands that had been directed by the President to be surveyed.

The one question, therefore, was whether the sale of lands was "authorized by law" as soon as a law was enacted providing for their survey and sale at such future times as the President should be pleased to designate, or whether it was not so, until he had actually directed the survey.

The New Madrid act gave the right of location in very general terms, "on any of the public lands of the said Territory, the sale of which is authorized by law;" lead mines and salt springs being excepted.

50. It is the *law* by which lands are authorized to be sold thereafter, at the direction of the President as to time, by which their "sale is authorized by law."

Ordinance of July 9, 1788; Old Journals, iv, 832.
Act of 26 May, 1824, 4 Stat., 50, Sec. 5.
Act of 18 May, 1796, 1 Stat., 464.
Act of 10 May, 1800, 2 Stat., 737.
Act of 3 March, 1803, Secs. 10, 11, 12, 2 Stat., 233.
Act of 2 March, 1805, Sec. 7, 2 Stat., 329.
Act of 31 March, 1808, Sec. 1, 2 Stat., 480.

And as conclusive—

Act of 15 Feb., 1811, Secs. 6, 8, 9, 10, 2 Stat., 665.
Act of 3 March, 1811, 2 Stat., 663.
Act of 11 March, 1820, 3 Stat., 577.
Act of 17 Feb., 1818, 3 Stat., 406.
Act of 24 April, 1820, 3 Stat., 566.

The acts of February 15, 1811, and March 3, 1811, authorized the sale of all the lands in the whole Territory of Missouri, without further legislation; and from the date of the former act, the sale of all lands in the Territory was "authorized by law," with such exceptions as the laws expressly made.

2 Stat. at Large, 665–663.

51. If the sale of lands was not "authorized by law," when a law authorized their future survey and sale, and spoke of them as lands "the sale of which is hereby authorized," this is because their sale is *not* authorized by law, when it *is* authorized, and when the law declares in express words that it *is* authorized. And if it is not *then* authorized, to fix on any other time, prior to the very moment when men can pay the price and buy and have certificate of purchase, as the time when sale is authorized by law, is simply arbitrary.

52. The phrase must either mean that the particular land may by law be sold now, or that by law it may be sold at the proper time, when the necessary preparation shall have been made, it not being reserved from sale or declared not to be the subject of sale. Lands covered by incomplete French or Spanish grants, or to which the Indian title had not been extinguished, were lands, the sale of which was *not* authorized by law, until the grants were rejected or the Indian title extinguished.

53. It was not permissible to give such a construction to the phrase "the sale of which is authorized by law" as would make the law ineffectual. This would be to stultify Congress. Construction must always be such, *ut res magis valeat quàm pereat.* To hold that it meant that lands owned by the United States, and the sale of which was not forbidden, if not yet surveyed, or directed to be surveyed, were *not* lands, the sale of which was authorized by law, was to hold that when the New Madrid act passed, there was *no* land in Missouri, the sale of which was authorized by law, and therefore none on which a settler whose land was injured could make a location.

Third Objection.

54. That the Territory of Missouri, within the meaning of the pre-emption act of 1814, was the Territory as organized into counties; and that, when the New Madrid act passed, no part of that Territory south of the River Arkansas had been organized into counties.

This notion was absurd, and, if there had been anything in it, the Hot Springs were, in 1820, in the organized County of Clark.

Fourth Objection.

55. That the location was invalid, because made in a square, and before any public survey of the neighboring lands; the law of 1815 requiring all locations to conform to the lines of the public surveys.

This objection was removed by the act of 26th April, 1822, entitled "An act to *perfect* certain locations and sales of the public lands in Missouri," (3 Stat., 668,) which provides that the *locations* theretofore made, of warrants issued under the act of 1815 if made in pursuance of that act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional or quarter-

sectional lines of the public surveys. That objection, therefore disappeared as to all such locations.

56. But what that act did, was not to cure and validate locations made without authority of law, but to obviate and overrule a baseless and frivolous objection. There was not a single syllable in the New Madrid act that indicated an intention to require locations to be made in conformity to the lines of the public surveys. There *were* no such lines of the public surveys, in 1815, for no such surveys were even begun. The law, by its broad and general language, and by its specific directions as to surveys at the cost of the party, permitted and evidently intended, that the French and Spanish concessionaires and settlers whose irregular tracts of all shapes and sizes had been injured by earthquake, should go where they liked, between the boundaries of the Territory, into the wilderness, if they pleased; select lands to suit their fancy, where they pleased, and have the quantity to which they were entitled surveyed, in any shape they pleased, precisely as they had had surveyed, under the old *régime*, their lands near the Mississippi, each having his own plat, with no reference to any public surveys. No officer had any right to impose restrictions not imposed by the law itself; and the law imposed none, if the sale of the lands selected was not forbidden by law.

57. Thus the *first* opinion of Mr. Wirt, that locations of New Madrid claims *must conform with the general plan of surveying the public land*, was unwarranted by anything in the law of 1815, was utterly inconsistent with its purpose, intention, spirit and letter, and was simply an annihilation of legislation.

58. It was not true in law, as he stated in June, 1820, that locations made in a square, before the sectional lines were run, were inadmissible. It was not true in point of law, that the sale of lands was not authorized by law, until

the sectional lines were run, and that consequently all locations made previously to that were unauthorized. The act of 1815 meant and said that they might be made without reference to the public surveys; and under it the claims could be located in any shape that would give the quantity—and any where. And there was no warrant in law for holding, as the Attorney General did, that permitting locations to be so surveyed as to make fractions was unauthorized by law, and the sale of the fractions so caused was illegal and void; for the location of many New Madrid claims, *e. g.* this for 170 acres and a fraction, could not possibly be located in any way without causing fractions.

Fifth Objection.

59. That the location of a New Madrid claim could only be made on lands, the sale of which *was* authorized by law, on the 17th day of February, 1815, when the New Madrid act was passed, and that the sale of the lands south of the River Arkansas was not authorized by law while the Quapaw title remained unextinguished, as it did until August 24, 1818.

This conceit of Mr. Wirt had no foundation in law or in the rules of syntax. That a man truly great and learned should ever have propounded it, is matter of amazement. If he had reflected but a moment he would have remembered phrases used by himself, as they are used by every one, in perfect accordance with the rules of grammar, in which the present tense of verbs has a future signification. For such use of it few references are needed.

Articles of Confederation, Art. VII: "When land forces are raised by any State." . . .

The Constitution, Art. I, § 3: "When the President of the United States *is* tried." . . .

60. So absurd a notion could never receive judicial sanction, and this Court has not permitted it to prevail.

Stoddard *vs.* Chambers, 2 Howard, 318.
Easton *vs.* Salisbury, 3 Howard, 431.
Bissell *vs.* Penrose, 8 Howard, 317.
Watts *vs.* Stoddard, 8 Howard, 345.

61. And the Court has also holden that locations of New Madrid claims could be made before the lands were offered for sale, and even before they had been surveyed. It has broadly held that a New Madrid location was rendered valid by the act of 1822, although the section-lines had not been run when the location was made.

Barry *vs.* Gamble, 3 Howard, 32.

62. The laws in force in 1820 empowered the President to cause to be surveyed and sold any lands, the Indian titles whereto might, at any time after, be extinguished. The Quapaw title was extinguished in 1818, and from that moment the sale of the lands which they had claimed was "authorized by law."

Act of March 3, 1811, Sec. 8, 2 Stat., 665.
Act of 13 May, 1796, 1 Stat., 464.
Act of 29 April, 1816, 3 Stat., 3.
Act of 17 February, 1818, 3 Stat., 406.
Act of 5 April, 1826, 4 Stat., 153.
Act of 2 March, 1827, 4 Stat., 235.
Opin. of Att'y. Gen. Legaré, 3 Ops. of Atty's Gen., 705.
Act of 17 February, 1818, 3 Stat., 406.

Sixth Objection.

63. That the reservation by the act of 1832 barred Rector's claim, and was not removed by the act of March 1, 1843, because the latter was general and the former special; and because the latter cured but the single defect of the

non-extinguishment of the Quapaw title on the 17th of February, 1815.

That objection had no validity against the New Madrid location, which was made after the Indian title was extinquished, and when sale of the land was authorized by law.

The reservation act had no effect upon his claim. It forbade future entry or location, had no retroactive effect, and could not annul the location of 1820, nor divest any rights acquired by it.

The act of 1843 only removed, as to his claim, an illegal objection that would not die after its brains were out. It must be clear that the declaration, in the act of 1832, being simply that the United States would not sell until they should see fit to sell the land, *could* not stand in the way of the removal of an obstacle, unjustly interposed, to prevent or delay the obtaining a patent upon a good and valid location made long before. Whether the act of 1843 was general or special, it unquestionably removed *that* obstacle as to *all* cases. None are excepted. The *effect* of the removal in a given case is another question.

64. We are not interested to inquire whether, as to the various claims to the Hot Springs, the act of 1843 repealed the reservation in the act of 1832, because the reservation did not affect Rector's claim, and the act of 1843 removed no valid objection to it.

65. And if the objection of the existence of the Indian title in 1815 had been a valid one, still it does not seem to us that the question would have been whether the act of 1843 repealed the reservation: but whether, when the act of 1843 removed that objection, and declared that the locations south of the Arkansas should be perfected into grants, precisely as if that title had not then existed, this did not reach back and confirm the location *ab initio?* If it did,

then it was made to have been a good title by valid location, before the reservation, and that reservation did not apply to it any more than it would have done if the objection of Indian title had never been made or had never even existed.

66. Certainly, it cannot be argued that the act of 1843 did not remove the objection of Indian title, as to the claims to the Hot Springs, because the effect of such removal would be the repeal of the reservation. No more can be contended than that, by the removal of that objection, such repeal was not effected. The act makes no exception. It removes that specific objection as to all Preemption and New Madrid locations south of the Arkansas River. Whether, in providing that "the locations heretotore made" should be perfected into grants, the law added the tacit limitation, "in case the lands located have not been reserved from entry or location," or, "except the location upon the Hot Springs," we are not concerned to inquire, since the case of Mackay *vs.* Easton; for we had, at least, such a location in 1820, and so far complete, as to give a right that could not be cut off by the reservation.

Valid or invalid, the objection of Indian title in 1815 was removed in all cases, putting all upon the same footing as if there had never been any such title.

Sec. 5.

REMEDIAL ACTS OF CONGRESS.

Three of these, subjected to the narrow and pedantic verbal rules of interpretation applied by the land—and law—officers of the Government to all beneficial and remedial laws, have been little more than ineffectual protests against arbitrary rulings.

I.

67. The act of 1822 quashed the restriction, wholly unauthorized by the New Madrid act, of New Madrid locations, to the sectional or quarter-sectional lines of the public surveys, which the larger wisdom of the Treasury Department and Attorney General had interpolated into the law. Declaring that *all* locations theretofore made, and not conforming to those lines, if made in pursuance of the provisions of the act in other respects, should be perfected into grants, no exception of locations made on lands not surveyed or directed to be surveyed, was enacted, nor was there any reason why there should be; for the unsurveyed and remote lands were not more precious to the United States than those that had been surveyed, and of these there had been no lines to be disregarded.

3 Stat. at Large, 668.

68. This act quashed the objections made in 1820; but in 1825 the Executive perverseness and ingenuity discovered a new one, and held that all locations on lands the sale of which was not authorized by law on the 17th of February, 1815, were void: and this, coupled with the unremoved objection that only lands the sectional lines whereof had been run, or lands the survey whereof had been directed, were lands the sale of which was authorized by law, completely annulled the remedial act of 1822.

II.

69. The act of March 2, 1827, provided "*that the locations of lands heretofore made according to law*," by virtue of warrants issued under the New Madrid act, not exceeding 640 acres in the whole, to any one sufferer, "should be perfected into grants in the manner prescribed by that act, any construction thereof to the contrary notwithstanding." The copies of the certificate in evidence, and Exhibit or Schedule F, show that

for two lots in the Village of Little Prairie, one lot in the Village of New Madrid, and the concession on Bayou St. John, all injured by earthquake, Langlois or his assignees obtained certificates 270, 271, 467, and 470, for in the aggregate 640 acres.

4 Stat. at Large, 219.

70. His locations, therefore, including that on the Hot Springs, were among those intended to be cured by this act; and it was for a time held by the Secretary of the Interior that this act of 1827 healed locations made south of the Arkansas, on lands claimed by the Quapaws.

And as this location *was* made according to law, it was confirmed by the act of 1827, and entitled from that time to be perfected by a patent.

71. But it having been held that the location by Hammond and Rector was not made "according to law," because it had not been made according to the notions of the Attorney General, annihilatory of the law, this act of 1827 also was nullified as to him, the objection remaining unremoved that because of the Quapaw title the sale of the land was not authorized at the date of the passage of the New Madrid act. It was reserved for the ingenuity of counsel of the Government at a much later date to discover that the act of 1827 could not help the Langlois location, because in reciting the purpose of the act of 1815, it described it as being for the relief of the inhabitants of the late county of New Madrid, who suffered by earthquakes, in lieu of lots and out-lots in and adjacent to the villages of New Madrid and Little Prairie, while the land for which certificate 467 was granted, was a tract of 200 arpents on Bayou St. John, not in or adjacent to, either village. What a construction of a remedial act, *reipublicæ beneficii!* especially as the town of New Madrid was situated on the west bank of the Mississipppi, bounded on the north by the

Bayou St. John, and on the south by a creek (I suppose, the Bayou Gayoso) which heads in a cypress swamp (I suppose the Grand Marais) in the rear of the town. Little Prairie was thirty miles below New Madrid. Stoddard: Sketches of Louisiana, 209.

72. The act excepts no location of a warrant, made according to law, but provides that all, not exceeding 640 acres to any one sufferer, shall be perfected into grants, and repudiates all constructions of the act of 1815 to the contrary. Hammond and Rector had made a location, by application and survey, which, solely by means of construction of that law, had been refused completion by the officers of the Government, when nothing remained to be done, but what the law required *them* to do: and it is only by a narrow and illiberal construction of this act of 1827, that it can be held not to have confirmed their location.

III.

The act of 1st March, 1843, provided that "*the locations heretofore made*" of *warrants* issued under the New Madrid act, upon lands south of the Arkansas River, if made in pursuance of that act in other respects (as that of the Langlois claim was) should be *perfected into grants, in like manner as if the Indian title to such lands had been completely extinguished at the time of the passage of that act.*

5 Stat. at Large, 603.

73. That this recognized the validity of the objection obviated, and the correctness of Mr. Wirt's opinion as to the words, "is authorized by law," is a wholly unwarranted assumption. That it intended no such recognition, and did not recognize the objection as valid, is clearly shown by the second section, which gave each claimant, in case his location had been sold, the right to enter a like quantity of land anywhere in Arkansas.

74. That is, the law virtually declared that the objection that the Indian title had not been extinguished at the passage of the New Madrid act, never was valid, if it had been extinguished when the location was made, and if, in that respect, as well as in all others, the location had been made in pursuance of law. Else, why *compensate* the claimant for the loss of lands sold by the Government, to which he had no title by a valid location?

Op. of Atto. Gen. Legaré, December 7, 1841; Ops. of Attos. Gen., III, 720.
Op. of Atto. Gen. Johnson; Ops. V, 236, 237.
Op. of Atto. Gen. Cushing; Ops. VI, 700.

75. Thus, if there ever was any validity in the objection, the act removed it; and, moreover, as no lands south of the Arkansas had been surveyed when the New Madrid act passed, and there were no lines of the public surveys to conform to; and as the country adjacent to the Hot Springs had not been surveyed in 1820, and as, in short, every objection ever made by the Attorney General applied to such locations south of the Arkansas, and to say that the Indian title had not been extinguished, was to say that all such objections existed, (for that one fact included them all in itself,) they also, one and all, were cured by the act of 1843. The law is not to be understood to say to a claimant, "although the land you applied for and whereon by survey you located our claim was Indian land, and therefore *could* not be surveyed nor appropriated, you shall have your location perfected into a grant; but, because the land *had* not been surveyed, or for any other thing that could not but be while the Indian title was unextinguished, you shall *not* have your location perfected into a title."

76. And the act of 1843 also cured the objection, if it was one, that the plat of the survey of 1820, and notice of it had never been transmitted to the Recorder of Land Titles; for

there was a location, in the sense in which the New Madrid act used that word, and according to the law that has never varied; and the act of 1843 declares that the "locations heretofore made" of warrants issued shall be perfected into grants, if *made* in pursuance of the New Madrid act; without saying, if plat and notice were transmitted to the Recorder. For they could not be transmitted, where the Indian title was not extinguished; and therefore it is impossible to hold that the provision that the warrants shall be perfected into grants in like manner as if the Indian title to such lands had been extinguished at the passage of the act, shall have no effect, for something that was a consequence of the existence of that title,—for the failure to do what would have been done, but for the existence of that title.

77. That the statute retroacted, as to whatever objections it annulled, is clear. Without such retroaction, a location would not be perfected into a grant, *in like manner* as if the Indian title had been extinguished before 1815. Without it, the effect of the act would have been to *make* a grant, and not *to perfect into grants* locations made twenty-five years before.

Every ratification retroacts, and is equivalent to a mandate. It makes the act of the agent to have been, *all the time*, *ab origine*, the act of the principal. It reaches back, and by relation, cuts out intervening liens, incumbrances and titles. Here the retroactivity is express. The locations are not made good *from henceforward*, but as though the Indian title had never existed, for the past as well as the future, and must be everywhere held to have been always good.

Supreme Court of the United States.

No. 646.

HENRY M. RECTOR

vs.

THE UNITED STATES AND OTHERS.

ARGUMENT

UPON THE CLAIM UNDER THE NEW MADRID LOCATION.

FOR THE CLAIMANT, RECTOR.

PIKE & JOHNSON,
SANBORN & KING,
Of Counsel for Henry M. Rector.

Supreme Court of the United States.

HENRY M. RECTOR *vs.* THE UNITED STATES.

ARGUMENT.

Part I.

ON THE FACTS.

The Act of Congress, (which it will be convenient to refer to hereafter as the "New Madrid Act," or "the Act of 1815") of February 17, 1815, (3 Stat. at Large, 211,) Sec 2, provided that the "*location*" of a claim under it should be made *on the application of the claimant*, (it is not said to whom,) by the Principal Deputy Surveyor for the Territory of Missouri, (whom the Surveyor General of Illinois and Missouri succeeded, in 1816,) or under his direction.

It then proceeds, parenthetically, to direct what shall be *the duty of that officer*, in these words: "Whose duty it shall be to cause a survey thereof to be made, *and to return a plat of such location made*, to the said Recorder, *together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made.*"

And it then prescribes the duty of the Recorder (of Land Titles at St. Louis), on receiving such plat and notice, in these words: "which notice and plat the said Recorder shall cause to be recorded in his office," &c., the residue of the

section providing for the fees of the Recorder and Surveyor, both to be paid by the claimant.

The 3d Section made it the duty of the Recorder of Land Titles to transmit a report of the claims allowed, and locations made, to the Commissioner of the General Land Office; and then follows this provision: "and shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated, *which certificate shall be filed with the said Recorder within twelve months after date, and the Recorder shall thereupon issue a certificate in favor of the party, which certificate being transmitted to the Commissioner of the General Land Office, shall entitle the party to a patent, to be issued in like manner as is provided by law for other public lands of the United States.*"

There is no ambiguity, or difficulty as to the intention of the legislator or the meaning of the law, until we reach the middle of the 2d Section, when it becomes and continues to the end to be confused and incoherent. That which strikes us, first of all, is, that the phrase "and upon such certificate being issued and *the location made*," is not connected with anything that follows in the same section, so as to make a complete sentence. Something has evidently been omitted, or cut off from it and misplaced.

The 3d Section presents an even greater confusion; and, as it reads, cannot possibly be expressive of the intention of the legislator. Apparently it provides that the Recorder of Land Titles, on receiving the plat and notice, shall deliver to the claimant a certificate, stating the circumstances of the case, *and that he is entitled to a patent*, on which he is *not* to obtain a patent; but which he must file with the officer issuing it, the same Recorder of Land Titles, within twelve months, and this same officer shall thereupon issue a certificate "in favor of the party," transmitting which to the General Land Office, he may obtain a patent.

Why return the first certificate, which states that he IS

entitled to a patent, in order to take a second from the same officer, "in his favor"? No possible reason can be imagined for this. Why provide that he should file it within twelve months, or rather, why assume that he might wish to hold it, without a purpose and to no conceivable use or benefit, in order at last to return it, and get one in no respect better? He could, if he chose, hand it back the moment he received it, and demand the second certificate. Of what use could the returned certificate be to the Recorder or to any human being in the world?

These questions perplex and puzzle us, only in case we do not know the origin of these provisions in the older laws which explain them. They show that the third section is in some manner mutilated or confused; for, as it reads, it is sheer nonsense. It is not possible that the Recorder was required to issue a certificate, for the purpose of immediately taking it back and giving another. It will not do to impute such nonsense to the legislator.

The offices of Registers of the Land Offices in the Territory of Orleans, and of Recorder of Land Titles for the District of Louisiana, (all the country acquired from France, north of the 33d degree of north latitude,) were created by act of March 2, 1805. (2 Stat. at Large, 326, § 3.)

That statute provided for the confirmation of claims to lands in the same manner as if their titles had been completed, where the parties held any duly registered warrant or order of survey for land to which the Indian title had been extinguished, and whereof they were in possession, cultivating them, at a certain date; and also it granted to every person who had actually settled on land, by proper permission and according to the laws, usages and customs of the Spanish Government, and was inhabiting and cultivating the same on the 20th of December, 1803, such tract of land, not containing more than one mile square, with such further quantity as by the laws, usages and customs of the Spanish Government was allowed to his wife and family.

To ascertain these titles and claims, Registers and the Recorder were appointed. The act required every one claiming by grant or incomplete title to deliver to the Register of the Land Office or Recorder of Land Titles of the district *a notice in writing*, stating the nature and extent of his claims, *together with a plat of the tract or tracts claimed*, and also for the purpose of being recorded, every grant, order of survey, deed or conveyance, or other written evidence of his claim. If such notice in writing and plat were not so delivered, and such written evidence recorded, the claim was to be void and barred.

By the act of March 3, 1807, (2 Stat. at Large, 440,) respecting claims to lands in the Territories of Orleans and Louisiana, the same system of delivering to the proper Register or Recorder notices in writing and the written evidence of claims to land was continued, and section 6 enables us to understand the meaning of the New Madrid Act, and to read it according to the legislative intention in regard to the two certificates provided for, "God knows for what purpose," the Commissioner of the General Land Office said at the time.

For it provided that when the Commissioners had decided in favor of a party, they should send transcripts of their decisions to the Secretary of the Treasury and to the Surveyor General, or officer acting as Surveyor General, and they should *deliver to the party a certificate stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated,* [the very language of the New Madrid Act,] which certificate (as in that Act) was to be filed with the proper Register or Recorder, within twelve months after date, "and the Register or Recorder shall thereupon, (a plat of the tract of land therein designated being previously filed with him or transmitted to him by the officer acting as Surveyor General in the manner hereinafter provided,) issue a certificate *in favor of the party*, [again the same language,] which certificate being transmitted to

the Secretary of the Treasury, &c., [precisely as the concluding sentence of the New Madrid Act.]

It is perfectly plain that the New Madrid Act was copied, in these passages, from that of 1807, and did not mean that the Recorder of Land Titles should issue a certificate that the party was "entitled to a patent," for the purpose of taking it back *eo instanti*, or after a time, and giving another "in favor of the party."

The Surveyor General received, with the application of location, the first certificate issued by the Recorder, it being his authority for ordering the survey. This he retained, and did not afterwards return it to the party, but when the survey had been made, in conformity to the application, (which also he had and retained, and was the only person in the world possessed of means to determine whether the survey was made in accordance with it,) and he had approved it, he was to give the claimant a certificate of his right to a patent, in lieu of the original certificate retained.

Section 7 of the Act of 1807 authorized surveys or resurveys of "the tracts of land thus granted by the Commissioners," to be made at the expense of the parties; and the Surveyor General, or officer acting as such, was required to "transmit general and particular plats of the tracts of land thus surveyed to the proper Register or Recorder," and copies of the same to the Secretary of the Treasury.

That the New Madrid Act was understood at the time to require the Surveyor General to give to the claimant some certificate or other paper, to be evidence that the location had been made, and that he was entitled to the patent, is certain, because on the 15th of April, 1817, the Secretary of the Treasury had advised the Surveyor General to adhere to his determination not to furnish *the New Madrid claimants* with any *documents* to enable them to apply for patents, until *he* had ascertained that their *locations* did not conflict with prior claims. The law did not require or authorize the Surveyor General to furnish the *party* with any *documents* at all,

to enable him to apply for patents, unless it was *he* who was to give the first certificate, that the party was entitled to a patent.

Since the New Madrid Act meant that the first certificate should be given by the Surveyor General, it is clear that the location had become complete before this certificate was given, for it was to state that the party was entitled to a patent. The notice to be given by the Surveyor General to the Recorder was, then, necessarily notice that a location had been made; and the transmission by the Surveyor General of this notice and a plat, which he was not required to send within any particular time, was no part of the process of location, nor necessary to complete the *right* to a patent; but only a matter of routine, to enable the party to have the fruit of a right already complete and perfect, and so certified to be.

All that the *claimant* had to do, to effect a location of his New Madrid certificate, was precisely that which a French or Spanish claimant had had to do to locate his concession—to apply in writing, with designation of the land desired sufficient to govern the surveyor, to the Principal Deputy Surveyor, to have it surveyed, offering to pay the cost of survey; to show the Deputy Surveyor the land, see that he surveyed it, and that he returned the survey and plat to the office of the Principal Deputy Surveyor at St. Louis; and to receive from him copies of both for his own use and keeping. Then he was entitled to a certificate from the Principal Deputy Surveyor, to the effect that he was entitled to a patent. What remained to be done to enable him to avail himself of that right it was the official duty of the Principal Deputy Surveyor to do, and his failure to do it could not prejudice the claimant.

So soon as the survey was made and returned to the proper office, where it was to be filed and remain, the claim was *located*, and the claimant's *right* was complete, as a preemptor's is when he has paid for the land and obtained his certificate of purchase. The land located, the Supreme Court said

in Bagnell *vs.* Broderick, (13 Peters, 436,) is not deemed to be appropriated by him *until the survey is returned, the plat and certificate of survey being the only evidence of location recognized by the Government.*

In this case it is proven that the survey was ordered to be made by the Surveyor General. If that could not now be proven, it would be presumed, upon proof that the survey was really made. It is proven that the survey was made, and that copies of the plat and field-notes, certified by James S. Conway, Deputy Surveyor, afterwards, in 1833, and for several years after, Surveyor General for Arkansas, were duly made out, to the number of three, each being an original, one of which was returned to and deposited in the Surveyor General's office at St. Louis, and two others were, in 1850, in the possession of Henry M. Rector, who then filed them in the Surveyor General's office at Little Rock, and afterwards withdrew one of them and filed it in the General Land Office.

It is proven that the copy filed in the office of the Surveyor General at St. Louis was in that of the Surveyor General at Little Rock, after the transfer of the papers, files and records from the former to the latter, upon its establishment in 1833. It may have been that it was taken out at the time of the resurvey, and lost or destroyed. At all events, it had disappeared in 1850. It was of no more authenticity, and had no more an official character than the originals in the custody of the party himself; in the *official* custody of the Surveyor General, and a copy of it certified by him would have been evidence. It had been made out, certified by the Deputy Surveyor, returned, accepted as an official survey, numbered, placed on file, and registered; and, if the location was a legal one, or afterwards legalized, the land was severed from the public domain, and title complete.

The genuineness of the signature and certificate of James S. Conway is proven beyond the possibility of a doubt; and the water-marks upon the paper, testimony that cannot lie,

prove its age, and that it was *official* paper. The marks of the old survey, recognizable still at the time of the resurvey in 1838, make the proof of the survey complete. If it were necessary, the legal presumption would come in aid of it, that, as the survey was applied for, and it was the *duty* of the Surveyor General to cause it to be made, he did so, since, as we shall show, he thought such a location valid, and contested the views of Mr. Wirt to the contrary. General William Rector was the brother of Elias Rector, and James S. Conway connected with him by marriage and an intimate friend, which facts tend to explain why the latter was selected to make the survey, and why he was willing to make the long journey through an unsettled country, necessary to the doing it. It is not likely that anything was omitted that could lawfully and properly be done, to make the location effectual; nor that James S. Conway, when made Surveyor General in 1833, would have neglected to preserve the evidence of his survey of 1820.

The principal attack upon Rector's claim has always been directed against what has been regarded as its weak point, the failure of the Surveyor General of Illinois and Missouri to cause to be recorded in his office the plat and notes of the survey of 1820; its non-transmission, with the required notice from him, to the Recorder of Land Titles, the absence of any record of it in the office of that Recorder, and the failure of the assignees of the claimant to see that these things were done, and to obtain the proper certificate from the Recorder; coupled with the production of the two copies of the surveys by the claimant himself in 1850. We need not repeat the inferences deduced from these facts.

None of the surveys sent from Missouri to Arkansas were recorded in the office of the Surveyor General at Little Rock until the year 1843. But this survey of 1820 was *registered* or scheduled, both in the office at St. Louis, and in that at Little Rock, as survey No. 2,903, on the exhibit or schedule of each office. This concurs with the other testimony to

prove not only that the survey was actually made, not only, also, that it was *returned*, but, also, that it was deposited in the office of the Surveyor General at St. Louis, taken charge of and kept there, although not *recorded* in the book kept for such records, and although no other of the steps required by law were taken with or upon it.

It is necessary for us to explain why no action was had upon it, and why it was treated as a private survey, not entitled to record.

Now, there is a complete and perfect reply to be made to these objections, which will fully explain why the survey of 1820 was not transmitted to the office of the Recorder of Land Titles with the "notice" from the Surveyor General, prescribed by law, and why it was not recorded in the office of the Surveyor General; and this reply will be sufficient, as it would be equally complete and perfect if no copy of the plat and notes of survey had ever been filed or deposited in the Surveyor General's office, but the only copies made had been delivered to the parties themselves, and retained in their custody.

This ample explanation will consist of a recital of matters of fact, as to instructions given and decisions made, without any argument of law, although it will be necessary to the explanation of these instructions and decisions, and in order that their full significance and pertinence may be understood, to refer to and quote the provisions of more than one statute. We will not go beyond the province of an argument on the facts.

We have already stated that the office of Recorder of Land Titles for the District of Louisiana was created by act of March 2d, 1805. The Louisiana Territory became the Missouri Territory on the 4th of June, 1812.

The office of Surveyor General was created by the act of May 18, 1796, (1 Stat. at Large, 464, §1,) his duty being to cause to be surveyed the lands northwest of the Ohio and above the mouth of the Kentucky.

By the act of February 28, 1806, (2 Stat. at Large, 352,) so much of the act of March 2, 1805, as required every claimant to deliver to the Recorder of Land Titles a plat of of the land claimed by him, was repealed, so far as related to claimants whose lands *had not been surveyed by the proper officer under the Spanish Government*, prior to December 20, 1803. And it was further provided that every survey thereafter made by the Principal Deputy Surveyor, as well as every other survey, (those of legal and complete titles only excepted,) should be held and considered as private surveys only.

This act provided for the appointment by the Surveyor General of a Principal Deputy Surveyor for the Territory of Louisiana, and that all plats of surveys and all other papers and documents pertaining to the office of the Surveyor General, under the Spanish Government, or to any other office theretofore established and authorized for the purpose of executing or recording surveys, should be delivered to the Principal Deputy Surveyor, and it was provided that *no* plat of survey should be evidence, unless certified by him. The Commissioners were empowered to order surveys and resurveys, *all to be at the expense of the parties.*

And the fourth section fixed the fees "for examining and *recording* the surveys executed by any of the deputies." Now, no other surveys than those of private land claims were provided for, and as these surveys were to be examined and *recorded* by the Principal Deputy Surveyor, the ascertainment of the boundaries of a claim was of course completed by his acceptance of the surveys: and the notice and plat given to the Recorder merely informed him that this was done; or, where a claim was located, that the location was complete.

The Principal Deputy Surveyor had the custody of all plats of surveys, from the beginning, under the act of 1806, creating the office. All plats in any other office were required to be delivered to him, the Recorder of Land Titles thereafter

receiving *no* plats *except where the land had been surveyed before the 20th of December*, 1803: and no one being empowered to certify a plat of survey, so as to make it evidence, except the Principal Deputy Surveyor, who was required to certify each "to be a true copy of the record in his office."

By the act of June 13, 1812, (2 Stat. at Large, 748,) the Principal Deputy Surveyor, when he had surveyed lands and lots belonging to villages, was required to make out plats of the surveys, and transmit them to the Surveyor General (resident in Illinois) who was required to forward copies to the Commissioner of the General Land Office and to the Recorder of Land Titles.

And when plats of the surveys were returned to the Recorder's office, he was to issue "a certificate in favor of the party," to be transmitted to the General Land Office.

By act of 3d March, 1813, § 5, (2 Stat. at Large, 814,) the Principal Deputy Surveyor was required to survey tracts of land, donations whereof had been confirmed by the Commissioners, and to return *plats of the surveys* to the office of the Recorder of Land Titles, who should issue for each tract a certificate in favor of the party.

By act of August 2, 1813, (3 Stat. at Large, 86,) the Recorder of Land Titles was invested with the functions of the Board of Commissioners to pass upon claims, French or Spanish, of actual settlers. This made it his duty to order surveys or resurveys.

The act of April 12, 1814, (3 Stat. at Large, 122,) confirming certain classes of claims that had been reported favorably on by the Board of Commissioners or a Register, or the Recorder, or that might thereafter be so, provided for orders of survey to be made by the Register or Recorder, where the land had not been surveyed, with full description of the tracts to be surveyed; and that on the return of the plat of survey, or where an order of survey might not be necessary, the Register or Recorder should give a certificate of confirmation, directed to the Commissioner of the General

Land Office. The Principal Deputy Surveyor was to make return of the surveys in separate plats, to the Register or Recorder, and also to transmit to the Surveyor General, or Surveyor of lands south of the Tennessee, a plat or plats of the surveys, by which officer copies were to be transmitted to the Commissioner of the General Land Office.

This plan was pursued in these cases, because the whole matter was before the Register or Recorder, invested with the functions of a Board of Commissioners to pass on the claims, and confirm or reject them. By the act of 1807, the Commissioners were to give the certificate that the claimant whose claim they had confirmed was entitled to a patent; and this being filed with the Recorder, he was to give one on which patent would issue. In that case, he was merely a recording officer, having no power to decide anything as to the confirmation or as to the survey. His function was merely to register what the Commissioners and Principal Deputy Surveyor had done. Under the act of 1814, he had judicial power, and the certificate he gave was of confirmation by himself; but he could not pass upon the survey. For, at the same time that a plat was sent to him, one was sent to the Surveyor General, to be by him forwarded to the General Land Office. It was the survey, then, and its approval by the Principal Deputy Surveyor, that carved the land out from the public domain and made the location of the confirmed grant complete.

Under the New Madrid Act, the application for survey was not made to the Recorder; nor did he order the survey. The *party* made his application to the Surveyor General, the Recorder knowing nothing about it. The Surveyor General, when the location was complete, sent him a plat and a notice, and gave the claimant a certificate that he was entitled to a patent, just as the Commissioners did under the act of 1807.

But soon after came the act of April 29, 1816, (3 Stat. at Large, 325,) which provided for the appointment of a Sur-

veyor (afterwards called "Surveyor General") of the lands of the United States in the Territories of Illinois and Missouri, with the same powers as the Surveyor General of the lands northwest of the Ohio and above the mouth of the Kentucky river. It was required that he should "transmit to the Registers of the Land Offices within the said Territories, respectively, general and particular plats *of all the lands surveyed, or to be surveyed*," and also "forward copies of said plats to the Commissioner of the General Land Office." And it was provided that all the plats of surveys belonging to any office theretofore established or authorized for the purpose of executing or recording surveys of lands in those Territories should be delivered to him; and any plat of survey duly certified by him should be admitted as evidence in the courts of the United States or Territories; and so much of any previous act of Congress as was repugnant to or inconsistent with this act, was repealed.

If, therefore, any prior law *did* make the office of the Recorder of Land Titles a place of deposit and record of any surveys, and require them to be returned there, and there kept, any such provision was repealed by this law. Unquestionably a location by survey was complete when the survey reached the place where it was to be approved, to remain, and to be recorded. This Court, as it will be seen hereafter, was long ago led into the error of supposing, as it still supposes, that the survey of a New Madrid location was returned to the office of the Recorder of Land Titles; but it never was so intended, nor was it ever so in practice; and this act of 1816 made it unnecessary and useless for the Recorder to record the plat and notice sent to him, repealing by implication the clause of the act of 1815 that required it. For if he *was* required to record it, he could certify a copy of the record: but the Surveyor General alone could certify copies of surveys; and the Recorder's copy, if made, would be but a copy of a copy, and not evidence of anything, anywhere.

As we have seen, the act of 1806 *repealed* so much of the

act of 1805 as required any other plats to be delivered to the Recorder of Land Titles, than those of surveys prior to December 20, 1803. Then subsequent acts provided for sending certain plats to him, other than these; and then the act of 1816 repealed all these later provisions.

And after the passage of the act of 1816, *all* the surveys of private land claims of every description were kept in the office of the Surveyor General for Illinois and Missouri. By law none *could* be retained in the office of the Recorder of Land Titles. And the act of June 15, 1832, (4 Stat., 531,) creating the office of Surveyor of the Territory of Arkansas, required the Surveyor for Illinois and Missouri to deliver to the new officer all the maps, papers, records, and documents relating to the public lands *and private land claims* in the Territory of Arkansas. There is no provision, nor ever was any, requiring any other office or officer to furnish such surveys.

The act of 1796, creating the office of Surveyor General, (1 Stat. at Large, 464, § 2,) required that the plats of the public surveys should be "recorded in books, to be kept for that purpose," in the office of the Surveyor General; but the act of 1806, (2 Stat. at Large, 352, §2,) extending his powers over the Territory of Louisiana, and requiring plats of surveys theretofore made to be delivered to his Principal Deputy, only provided that no plat of survey should be evidence unless certified by such Principal Deputy "to be a true copy of the record in his office."

No provision of law that we can find required the Surveyor General of Missouri to record in a book the surveys of New Madrid locations. Those of French and Spanish claims, of which confirmation was sought, though made by order of that officer and his deputies, were declared by the statute of February 28, 1806, (2 Stat., 352,) to be merely private surveys. By the same act *no* plat of survey could be admitted as evidence *in any court of justice*, unless certified by the Principal Deputy to be a true copy of the record in his office;

and by the act of April 29, 1816, (3 Stat., 325,) *any* plat of survey, duly certified by the Surveyor General, was admissible as evidence. By the same act the Surveyor General was required to transmit the general and particular plats of all lands surveyed, or to be surveyed, to the Registers—particular plats meaning plats of claims, as contradistinguished from general surveys of the public lands. All provisions of laws conflicting with this were repealed; and therefore, after the passage of this law, the office of the Recorder of Land Titles was not the place of return, deposit, filing, custody, and record of any plats whatever. He could not certify a copy of a plat, and if he gave one, it would be but a copy of a copy. The Surveyor General, at such time as suited him, sent him a copy of the plat of each New Madrid location, to enable him to give his final certificate, annexing the plat to it, or sending it to the General Land Office: but the survey could in no sense be said to be *returned* to the office of the Recorder; nor was the "Notice" given him by the Surveyor General a "Certificate of Survey."

The country in which the Hot Springs lay had not been surveyed, either in 1815 or 1820, nor was it surveyed until after 1837. Consequently the Langlois claim for 170.14 acres could not be located according to the lines of the public surveys; and, if located in a square, it would necessarily cause the public surveys on its sides to contain fractions of sections, of different dimensions.

The act of April 26, 1822, (3 Stat., 668,) confirmed locations theretofore made, *if made in pursuance of the act of* 1815 *in other respects*, and provided that they should be perfected into grants in like manner as if they had conformed to the public surveys—subsequent locators being bound to conform to those lines.

But the questions still remained, of what lands was the sale authorized by law? must the sale have been authorized by law on the 17th of February, 1815? and *when* does the sale of lands become authorized by law?

It is to be added that the Quapaw pretence of title to the lands in all the Ouachita River country was extinguished by treaty of August 24, 1818.

On the 10th of July, 1816, the Commissioner of the General Land Office instructed the Surveyor General at St. Louis, that the act of March 3, 1811, section 8, had directed that certain lands in the Territory of Louisiana should be surveyed; section 9 had directed that a land office should be established; and section 10 had directed that the land so surveyed should be offered for sale: wherefore, he decided, "*the tract of land which has been directed to be surveyed, for the purpose of being offered for sale at St. Louis, appears to be the tract upon which the locations are to be made.*

Laws, Instructions, and Opinions, printed by Gales & Seaton, in 1838, by order of the Senate, vol. 2, p. 820.

But he also advised the Surveyor General that, prior to the survey of the lands that were to be sold at St. Louis, the act of 1815 might be fairly construed to leave the form of the survey to the discretion of the surveyor.

Id., 821.

By the 8th section of the act of March 3, 1811, (2 Stat., 665,) the Surveyor General was directed to cause such of the public lands in the Territory of Louisiana, *as the President of the United States should direct*, to be surveyed and divided, in the manner provided by law as to the lands northwest of the Ohio and above the River Kentucky.

Now, at the date of the passage of the New Madrid Act, (February 17, 1815,) *the President had not directed a single foot of land to be surveyed* in Missouri. (Record, 305.) Consequently, if New Madrid claims could only be located on land the sale of which *was* authorized by law when the act of February 17, 1815, was enacted, and if the sale of lands was not authorized until they were surveyed, *there was*

was not a single foot of land in Missouri on which a claimant could, without a new law to authorize it, *locate his claim;* and the act of 1815 was utterly worthless to any one.

For the very first direction for the survey of lands in that Territory was given on the 23d of March, 1815, by letter from the Commissioner of the General Land Office to the Surveyor General at Chillicothe, by which the latter was instructed to direct the Principal Deputy Surveyor of the Territory of Missouri to survey into townships and sections such part of that Territory as would include the principal part of the private claims—*i. e.*, of the French and Spanish claims.

Instr. and Opin., 809.

On the 24th and 27th of March, 1815, the Commissioner instructed the Surveyor General at Chillicothe in regard to surveying as soon as possible two millions of acres of military lands, (bounties to soldiers,) between the rivers Mississippi and Arkansas.

Instr. and Opin., 809, 810.

And it was not until the 6th of March, 1816, that the Commissioner of the General Land Office by letter informed the same Surveyor General that the President of the United States had directed that about one hundred townships should be surveyed and prepared for sale in the Territory of Missouri, *in the vicinity of St. Louis*, in addition to the surveys, [of military lands] into townships, before directed; surveying first the lands between the Mississippi and Missouri rivers, ceded by the Sac and Fox Indians; and the residue of the one hundred townships in some other part of the Territory, *in the vicinity of St. Louis*. If the lands between the Mississippi and Missouri had been surveyed into townships under former directions, they were to be subdivided for sale, and an additional survey into townships might be made in some other part of the Territory, for the purpose of ascertaining the character of the country, and private claims.

Thus, he said, the directions of the President would be obeyed, viz: to survey into townships two hundred townships, and into sections one hundred townships.

Instr. and Opin., 812.

No directions to survey other lands were given until after the year 1820; none, indeed, for several years afterwards. And in 1820 these instructions of the Commissioner, so far as we can learn, remained unchanged. While they stood in the way it was quite evident that no locations of lands not surveyed need be attempted. The decision that these locations must conform to the lines of the public surveys was not changed by law until 26th April, 1822.

The President directed no sale of lands in the Territory until 1823.

The Surveyor General considered, of course, that it was contrary to his duty to treat such locations as of any validity, to certify the plats for record, or give any certificate on which the party might proceed to procure a patent. And this appears from the fact that, on the 15th of April, 1817, the Commissioner of the General Land Office said, in an official letter to the Surveyor General at St. Louis, "I approve of your determination *not to furnish the Madrid claimants with any documents*, to enable them to apply for patents, until you have clearly ascertained that their locations do not conflict with prior claims." And he further expressed the opinion, that lands which the President had not directed to be prepared for sale, could not with propriety be deemed lands, "the sale of which is authorized by law."—Inst. and Opin., 816.

It is also to be noted that on the 27th of November, 1818, the Secretary of the Treasury decided that the pre-emption act of April 12, 1814, could not, by any just construction, be extended to lands not within the organized limits of the Territory of Missouri: that Howard County was not, in 1814, within the limits of any County within the Territory;

and that the Territory of Missouri, within the meaning of that act, was the Territory as organized into Counties, inasmuch as any other construction might give rise to claims through the whole extent of country from the River Mississippi to the Pacific Ocean. See Letter to the Commissioner of the General Land Office, Instr. & Opins., 296.

On the 5th of July, 1820, the Commissioner of the General Land Office transmitted to the Surveyor General at St. Louis copies of three opinions given by the Attorney General, and informed him that the Secretary of the Treasury directed that locations which had been made, which were not conformable to law, might be withdrawn or amended, so as to conform to sectional lines. Instr. & Opin., 820.

The first opinion of Mr. Wirt, forwarded with the letter of 5th of July, 1820, was given on the 11th of May of that year, to the Secretary of the Treasury, and decided that the locations under the New Madrid Act *must conform with the general plan of surveying the public land.* Id., 10.

The second was given on the 19th of June; reiterated the former decisions, and held that it was wholly inadmissible to patent locations made in a square, previous to the sectional lines being run. He said: "The sale is not *authorized by law* until the sectional lines are run, *and consequently all locations previously made by these sufferers are unauthorized;* the circumstance of their being located in a square being perfectly immaterial to the policy of the law." Id., 10.

And by the third opinion he decided that the fundamental defect still remained, that the locations were made on lands the sale of which was not authorized by law; wherefore they were made *without authority*, and were *void;* and patents, consequently, could not issue on them. He said, "The contemporaneous survey of these *void* locations, with the general survey, *and the permitting them to produce the effect of causing fractions in the general survey*, was *unauthorized by law;*" and that the sale of the fractions so caused, was *illegal*

and *void*, because the public law, of which every one was bound to take notice, authorized no such fractions from such a cause; wherefore the sales ought to be set aside, and the sections subdivided according to law.

If all the laws in regard to the public lands had not been *in pari materiâ*, this notion would not have been quite so absurd; but what are we to say of the notion that "the public law authorized no such fractions from such a cause," when thousands of surveyed French and Spanish claims in Missouri and Arkansas made just such fractions; and by the act of March 3, 1811, (2 Stat., 662,) lands adjacent to streams or bodies of water were authorized, at the Surveyor's discretion, to be laid out without regard to the mode prescribed by law for the public surveys, so far as related to the contents of the tracts, and to the angles and boundary lines, into tracts of 58 poles in front and 465 poles in depth, of such shape, and bounded by such lines as the nature of the country should render practicable, and most convenient.

When the United States took possession of Upper Louisiana, nearly half the lands claimed there were unsurveyed, and the floating concessions, not yet located anywhere, were more numerous than the others. In Lower Louisiana, the claims covered at least 3,000,000 arpents. In Upper Louisiana, 868,771 arpents had been surveyed; and the conceded lands not surveyed amounted to 852,722 arpents. Those on the Arkansas are not included in this estimate.—Stoddard, Sketches of Louisiana, 245, 247.

And the fact is, that what is said by the learned counsel for the Government in regard to the sacred regard of the United States to the system of rectangular public surveys, is all nonsense. That the New Madrid Act limited locations under it to 160 and 640 acres, does not even *tend* to show that the intention was to confine them to quarter-sections and sections; for this limitation had its origin long before, in regard to incomplete grants confirmed, which were thus limited in *quantity*, although the survey of each was a special

one, without any regard to the public surveys, and the tracts so limited were of any shape the party chose to make them.

Act of 3 March, 1813, 2 Stat., 814.
2 March, 1805, id., 326.
21 April, 1806, id., 391, 3.
3 March, 1807, id., 441.

And as to the general system, acts, 2 Stat., 445, 455, 766, and 3 Stat., 121.

Also see act of March 26, 1804, 2 Stat., 277.

But to return. All the opinions of Mr. Attorney General Wirt were referred by the Secretary of the Treasury to the Commissioner of the General Land Office, who, in the reference to him of the third opinion, was directed to conform to the second, of which the third was confirmatory. Inst. & Opin., 13, 14.

And the Commissioner, so ordered to conform to these opinions, transmitted copies, as we have seen, to the Surveyor General at St. Louis, that he, also, might be governed by them.

The *order* to survey the Langlois claim had been given, and the survey *made*, before these opinions reached the Surveyor General, whose opinion had been, as we have seen, that locations in a square, on lands not surveyed, were legal, the Commissioner having expressed to him that opinion.

But within a day or two of the date and return of the survey, perhaps on the same day, certainly only a day or two before or after, came these opinions and explicit instructions. They absolutely forbade his approving the survey, *as a valid location* under the Mew Madrid Act; for he was peremptorily instructed to consider it no location. No certificate could issue on it, and he could not send a plat of it to the Recorder of Land Titles, with the notice prescribed by the New Madrid Act, because that would be to treat it officially as a

valid location. But he believed the location valid, approved it *as a survey* made in conformity to instructions or the application, *and thus adopted* it as if he had himself made it. He placed it on file and numbered it 2,903, thus treating it *as a location*, valid or invalid, but, at any rate, *in fact;* and his action in this respect was approved, as we shall see.

The Secretary of the Treasury ordered the opinions of the Attorney General to be conformed to by the Commissioner of the General Land Office, four years after the latter had informed the Surveyor General at St. Louis that the only land subject to location by the New Madrid claims was that *which had been directed to be surveyed, for the purpose of being offered for sale at St. Louis;* and three years after he had advised the same officer to adhere to his determination not to furnish the New Madrid claimants *with any documents to enable them to apply for patents*, until he had clearly ascertained that their locations did not conflict with prior claims; because, in such cases the locations were on lands, the sale of which was not authorized by law.

And, on the 5th of July, 1820, the opinions of Attorney General Wirt were forwarded from Washington to the Surveyor General at St. Louis, with directions from the Secretary of the Treasury, that locations of New Madrid claims, not conformable to the lines of the public surveys, might be withdrawn or amended so as to conform to the sectional lines. Inst. & Opin., 820.

The Surveyor General, it appears, gave his opinion frankly to the Commissioner of the General Land Office, that Mr. Wirt's notions were not correct, and that the locations were valid. For, on the 2d of September, 1820, the Commissioner wrote to the Surveyor General, "Your view of the law relative to New Madrid claims, and your reasoning on that subject, correspond with my own; but the opinion of the Attorney General will prevent patents issuing on certain locations which he has declared illegal." Congress, he thought,

would legalize the locations, and so prevent confusion, injury and trouble. Id., 822.

He said, also, that the direction given was not that the locations *should* be withdrawn, but that they *might* be; and that he presumed the holders of them would wait to see what would be done at the next session of Congress.

The Surveyor General had already recognized the right of Hammond and Rector to insist on their location, and hold what they regarded as a valid title to the springs and land. He had received the survey and plat, thereby making them in law his own, had filed and numbered them, and awaited the action of Congress. It is impossible to contest his right to do this: and the locators had a right to demand that he should do it. The law declared all surveys of French and Spanish claims, made by United States surveyors, private surveys; and every such claimant, holding such a survey, or one by a surveyor under the French or Spanish Government, had a perfect and absolute right to file his plat and survey, and compel the proper custodian of surveys to receive and keep them.

So Hammond and Rector had a right to have the tract surveyed, which they had applied to locate. They paid for the survey, as the law compelled them to; and when it had been made, they had a right, whether it constituted a valid or an invalid location, to place it in the Surveyor General's Office, for what it might be worth. He could neither refuse to order the survey, nor to receive the plat and notes of survey, when they were returned. He could leave it to higher authority to decide whether they constituted a valid location, and refuse to give a certificate, entitling to a patent, or to send a notice of the survey as a location, and a copy of the plat, to the Recorder of Land Titles; but Hammond and Rector had a right to demand that he should file and register the survey, and, so far as he could without disobedience of orders, secure to them the right to insist upon their location as a valid one. *Any* claimant could have a survey

made, for a French or Spanish grant, or under the New Madrid Act. Any one could file it or require it to be filed, and insist on it as a valid location. We do not see that the law permitted the Surveyor General to refuse to receive and file *any* survey of a private claim.

At any rate, he *did* not refuse in this case. He received the survey, numbered it and filed it, and it was placed on the proper Register or Schedule: and to this day the lines of the public surveys have never crossed the boundaries of this private survey, private because of a private claim, and because not part of the public surveys. There is no such quarter-section of 160 acres on the plats of the public surveys as Hale and the heirs of Belding claim by pretended right of pre-emption. There are only fractions of it.

But he was forbidden to do more; and having saved the rights of the parties, that they might assert them in the future, he obeyed the orders which he had received, neither sending copy of the plat to the General Land Office, nor copy of the plat and notice of location to the Recorder of Land Titles. What objection can be made to what he did? What more simple and more natural and more just to all parties?

It required ten or twelve days for a letter to reach St. Louis from Washington—that is, the letter of 5th July was probably received there about the 15th or 17th. Just at this moment came the survey of the Langlois claim, dated the 16th. Of course the opinions of the Attorney General made some stir. As we learn from Stoddard, there were vast numbers of floating French and Spanish concessions in the country, concessions authorizing the selection of lands not yet selected. Some of the holders of these wished to secure valuable mineral lands; but could find none to please them. Others were solicitous to extend them about the heads of some of the rivers; but these were either too distant from the settlements, or danger was apprehended from the Indians. Others, again, resolved to fix themselves among the

settlements, and it required some time to explore the country and to become acquainted with the various tracts of vacant lands dispersed over it. Stoddard, 247.

Of course the notions of Mr. Wirt would, if adhered to, compel the location of these claims, also, on surveyed lands, and by the section-lines, and invalidate all locations not so made, at least after the surveys had been made, if not, indeed, all from the beginning.

Of course there were discussion and excitement, and this, no doubt, caused the Surveyor General to write to the Commissioner. Of course Hammond and Rector believed their location valid. They saw no difference between it and the location of a floating concession; and there was none. The idea that it was objectionable because the land was in a remote region, would simply have been laughed at. It was, in fact, thought a great act of folly in Rector to place the claim upon the Hot Springs, then of no value. The Surveyor General believed the decisions of the Attorney General wrong. The Commissioner of the General Land Office, it afterwards appeared, did so likewise. The claimants were not compelled to abandon their locations. They could have the survey deposited in the Surveyor General's office, even if he would receive it as only a private survey; and they could procure the surveyor, who made the survey, to give them certified copies, to be retained by themselves, as evidence of the location.

Hammond and Rector had the right to *demand* copies of the survey from Conway, and to retain them in their possession. The law expressly gave them that right. By sec. 13 of act of 26 March, 1804, (2 Stat. 280,) every Deputy Surveyor was declared to be entitled to receive from the purchaser of any tract of land, the lines whereof he had run and marked, at the rate of three dollars a mile, for every mile surveyed and marked, *before he should deliver to him a copy of the plat of such tract*, stating its contents. It was the *purchaser*, by that act, who was to lodge with the Register a plat

of the tract, *certified by the District Surveyor*. By the act of 28th February, 1806, every Deputy Surveyor in the Territory of Louisiana had to take an oath or affirmation truly and faithfully to discharge the duties of his office.

That is just what the claimants did. It is proven that they did procure the deposit in the office of one copy of the plat and survey, and received others for themselves. As one was deposited, it will be presumed to have been lost; as it is proven many others were, in New Madrid cases, from the office of the Surveyor General at Little Rock.

Even if the Surveyor General had refused to recognize it at all, to number it, to file it, to permit it to remain in his office, the parties would thereby have lost none of their rights, gained by the application and survey. It is no new principle in this Court that the Government cannot be heard to say that a man has lost a right, when he has not himself been in default, by the refusal of a public officer to do what the law gave the party a right to demand. And, under the laws in regard to claims and rights to land in the Missouri Territory, the parties had a right to rely upon their location, and to have in their own custody and to preserve the evidences of it.

Nor was it a private survey, in the sense in which that is called a private survey, which one procures to be made, of his own or other land, by a surveyor who, in doing so, does not act officially. The New Madrid Act, by providing that the survey should be made by the Principal Deputy Surveyor, or under his direction, and by making the plat official evidence of the location, made the survey an official one, by a public officer performing a public duty, though of a private claim. It was a private claim, created by public grant.

Of course the Surveyor General knew that Mr. Wirt's decisions never could have been made, if he had known anything at all in regard to the condition of the lands and land claims in Missouri in 1815. He was a Marylander, the Secretary of the Treasury a Virginian, and the Commissioner of

the General Land Office a New England man. It was little wonder that they all blundered, and caused infinite vexation, much litigation, and great injustice and deprivation of private rights.

Congress, in April, 1822, removed the objection that the location did not conform to the lines of the public surveys, but there still remained the objection decided by the Attorney General, on the 19th of June, 1820, to be fatal, that sale of lands was not authorized by law, until the sectional lines were run, and that consequently all locations made before then were unauthorized. The effect was, that this act of 1822 was made to say to one of two claimants, "You located your claim on land that had been surveyed, and you did not conform to the sectional lines; and, *therefore*, your location shall be confirmed:" and to the other, "You made your location on land that had not yet been surveyed; and it does not conform to the sectional lines, as they have since been run; and, *therefore your* location shall *not* be confirmed." And if the latter asked, upon what ground of reason this proceeded, the answer was, "because the sale of the land you chose was not authorized by law, the sectional lines not having been run." So that the law was made to reward him who disregarded the sacred lines of the public surveys, and punish him who had gone further into the wilderness, and taken his land where there were no lines to be disregarded. And yet neither any human nor the Divine Reason can inform us *why* and *how* the sale of land was any *more* "authorized by law," after the lines were run, than before. The *law* had made no such distinction; and the act of 1822 did not intend that consequence. It meant to confirm locations not conforming to the lines of the public surveys, whether made before or after those surveys; but strict construction in favor of the Government, as against its beneficiaries, has always been the rule in the Department charged with the care of the public lands, as against the rights of individuals.

Thus, notwithstanding the act of 1822, the Surveyor Gen-

eral was still not permitted to regard the survey by James S. Conway as a valid location of the land and send the plat and a notice to the Recorder of Land Titles; and meanwhile, in the year 1822, Elias Rector, then sole owner of the claim died, leaving a widow and three infant children. The Government now urges as an objection that the claim was not for a long time thereafter prosecuted, and insists that it was abandoned. It is not an objection entitled to much respect, nor very fit to be resorted to. For, first, of the three infant children, two died young, and the eldest went to Arkansas to endeavor to enforce his rights, in 1835, as soon as he came of age, and has prosecuted it steadily ever since, until he is an old grey-headed man.

It is not known whether the widow made any effort to have the location acted on as valid. We may be permitted to suppose that she at once learned from her brother in-law, the Surveyor General, that under the decision of Mr. Wirt, held not to be overruled by the act of 1822, it would not only be useless, but she could, actually, not even take any step in the matter. And this became even less possible, a little while afterwards, because of the objection, even more fatal, that the lands south of the Arkansas were Indian lands, and not subject to be taken by New Madrid claimants, at the date of the New Madrid Act; at which time the sale of the lands must have been authorized, it was held, to make the selection valid.

For, on the 10th of October, 1825, Mr. Attorney General Wirt incidentally and inconsiderately decided that the expression, "the sale of which is authorized by law," in the act of 1815, confined the right of location of New Madrid claimants to lands, the sale whereof *was* authorized by law *at the date of the passage* of that act. Instr. & Opin., 25.

And on the 4th of December, 1826, the same question was presented to him in respect to a pre-emption, when he said, "These lands were not, *at the date of the act*, authorized to be sold; the title being, at that time, in the Quapaw In-

dians;" . . . but the further limitation is added, 'the sale of which *is* authorized by law'—that is to say, is now authorized by law. The *is*," he said, "cannot be construed to mean *shall have been;* and added, "The act, as it stands, speaks in the present tense; and it would, I think, be rather too bold a construction *to convert the present tense into the future past.*"

Instr. and Opin., 28.

Both these opinions, given to the Secretary of the Treasury, one in a case from Missouri, and the other in a case from Arkansas, which then was within the District of the Surveyor General of Missouri, undoubtedly were communicated to that office. And, as late as 1851, Mr. Secretary Stuart reiterated the same decision.

There never was a moment, therefore, from the time when Langlois proved his claim, in 1818, until long after 1843, when the survey, made in 1820, (the plat and notes of it, certified by the Deputy Surveyor,) *could* have been recognized and acted on without direct disobedience of the decisions of the law officer of the Government, adopted by the Secretary of the Treasury, as constituting a valid location of the claim or certificate, or a valid appropriation of the land; when the Surveyor General could send a plat of the survey and a notice of the location of the claim by it, to the Recorder of Land Titles, or a copy of the plat as evidence of such location, to the General Land Office; when he could give to Rector or his heir or representative a certificate to entitle him or them to a patent; when the Recorder of Land Titles, if such a certificate had been given and filed with him, and the plat and notice sent to him, could have granted, without disobeying the decisions of his superiors, the certificate upon which alone a patent could be demanded. The survey could but lie idle in the office of the Surveyor General; and the party interested could only hope for relief against the erroneous decision at the hands of Congress.

And, indeed, if the decisions had been correct, the survey, being of land to which these declared that Rector had and could have no right, would not have been an official survey, nor a public survey, nor evidence of anything, nor held in the *official* custody of the Surveyor General, nor legally entered in any book in his office, nor on any register or schedule. It had, under those decisions, no home, or domicil, or right even of commorancy or sufferance, anywhere on earth except in the hands, custody, and possession of the claimants, whose sole and exclusive private property and evidence of a fact these decisions adjudged it to be. But the Surveyor General did not believe the decisions to be correct. He believed the location valid; and *therefore* he received, numbered, filed and registered the survey, *and so made it his own in law.*

The objections and cavils in regard to the whereabouts of the survey, and because it was not sent to the Recorder of Land Titles, and recorded by him, and that the parties slept on their rights, and must be deemed to have abandoned the location, or else it must be concluded that there is something fraudulent in regard to the copies of the survey of 1820 making their appearance for the first time in 1850, are at once dissipated by these simple and conclusive facts.

In 1850 Rector produces two of the triplicates, and files them in the Surveyor General's Office. He had supposed the survey made in 1838 a valid survey under the application made in 1820. It was made by authority of Surveyor General Cross, of his own motion, but in accordance with the application and when it had been made and returned, he sent a plat and the notice required by the act of 1815, to the Recorder of Land Titles, who delivered to Rector his certificate, to entitle him to a patent. The same thing had been done before and was done afterwards, in many cases; many surveys being made long after 1838, and even until 1859, on applications filed as early as 1823; and there had been many resurveys; and in all these cases patents issued without question or difficulty.

The survey of 1838 was not an original survey, for the purpose of location. It was a re-survey, for it was ordered because there had been a former survey, and because it was governed by and to be made in accordance with the same application. It should have been identical with the original survey; but the lines and marks of that were supposed to have been effaced, an effect of time and the changes wrought by men, which has been the constant cause of re-surveys of the public lands and of private claims. It had legal relation, as a legal survey, to the date of the application; and Rector had right and reason to consider it valid even as a new survey, under the application.

When it was decided that the land could not be for the first time surveyed after the reservation of it from entry and location, he was compelled to resort again to the original survey, on which he had not been permitted to obtain the Recorder's certificate. We can see nothing in the objection to the resurvey, nor that the reservation affected its validity. The doctrine of relation has been accepted in the law, that by its means rights may be protected and injustice and injury prevented; and it cannot be more fitly applied than in his case. So that we hold it to be clear that Rector obtained and hath had since 1838 the proper certificate of the Recorder of Land Titles giving him a legal right to a patent; which certificate the United States have not successfully impeached.

Of the proof of the genuineness of the protocols of Conway's survey, of the transmission to the office at Little Rock of the one deposited in that at St. Louis, and of its remaining in that at Little Rock at least until 1838, we need only say that it is ample and conclusive. Nor is there only this written and oral evidence that the survey was made and returned, but it incontrovertibly appears by the register of certificates and surveys, an official record, made and kept in the office of the Surveyor General at St. Louis; by the Abstract or Exhibit of all New Madrid claims allowed and

surveyed, also made out there; by the number of the survey, (2,903) in each of these, agreeing with the protocol, and adopted by the Recorder in 1838 (Record, 295); by this official and indisputable evidence of the fact of the survey, both in the Surveyor General's office at St. Louis, and in the Surveyor General's office at Little Rock; and, finally, by the re-survey of the old lines by Rutherford and Langtree.

The *eleven* trees found on the east boundary line of the Conway survey, still standing, "bearing unmistakable evidence of the surveyor's blaze, which is peculiar to surveyors, and is readily recognized by all experienced surveyors, and particularly those who are in the habit of examining old surveys:" the *eight* of the line trees still found standing on the north boundary-line, *nine* on the west boundary-line, and *one* on the south, on which line nearly all the timber has been cut away, and houses built upon the ground; the witness or corner-tree, a pine, described in Conway's notes; the linear measurements agreeing precisely with his, from the corners to the creek; and the clear, precise and positive identification of the old lines, are ample proofs that the original survey was made as reported. Why should it not have been? Conway was a regularly employed Deputy Surveyor, then employed in surveying in Southern Arkansas; and Frederick R. Conway's testimony is conclusive as to his being employed to make the survey and that he returned it and was paid for it by Rector.

Rutherford's examination was made in January, 1872. Langtree had examined it, run the lines and measured the distances, and identifies the old survey. And the Court of Claims, before which this case was fully heard, and argued without limitation of time, and by which it was patiently, carefully and thoroughly considered, has found as "conclusive facts," that this survey of Deputy Surveyor James S. Conway "was numbered by him 2,903, and that on the official *list of certificates issued by the Recorder of Land Titles under the act of Congress of the* 17*th of February*, 1815,

transmitted by the land office at Saint Louis to the land office at Little Rock, when the latter was established, there appears "*survey* 2903" opposite *New Madrid certificate* 467, *for* 200 *arpents of land issued to Francis Langlois;*" "and this," the Court said, "is further strengthened by documents from the Interior Department, where the same numbered survey also appears opposite the same New Madrid certificate. These official recognitions, taken in connection with the positive and circumstantial evidence offered by the claimant, place above all doubt the fact that the survey was filed."

This finding, we might claim, is conclusive. For this is a Court of last resort, to correct errors of law, not a jury of nine, to find the facts. The highest Tribunal of a nation may fitly decline to lower its dignity and lessen its authority, by opinions as to simple questions of fact. For these, an intelligent jury is sufficiently competent. To the Roman Prætor or other magistrate belonged the function *juris dictionis*. For the determination of the facts he sent the matter, with instructions to a *Judex* or *Judices*; and when these had found the facts, he decided the law. So the Court of Cassation does not re-examine questions of fact. Its judges are not more qualified to do that, than the judges of the courts of Appeal of the Departments, or a jury of intelligent citizens.

But we need not rely on that. The proof of the survey is ample, uncontradicted, conclusive.

And we shall show that the protocol, even if unsustained at all points, would be admissible as an ancient document, found in the custody of the party whose rights were secured by it, and where, therefore, the custody of it properly was.

The survey of Hale, in 1838, was not a *new* survey, nor made at the instance of Rector. It was ordered, of his own motion, by Edward Cross, Surveyor General, because Hale was employed to sub-divide several townships in and around the Magnet Cove and Hot Springs, and as the lines of the Conway survey were supposed to have been obliterated or at least not to be sufficient for identification. To close the

lines of the public surveys on the lines of this private location, it was necessary to ascertain them. Hale was not furnished with the old survey, probably because the copy that had been in the office had been lost; but only with the "location," *i. e.* the application for survey made in 1820, and the Recorder's certificate No. 467. See his instructions and plat and field-notes. (Record, 287–289,) and he made the survey without any reference whatever to the former one.

As to the *facts* of the case, there is no possibility of doubt. There is not one as to which any question can be raised. They are absolutely beyond cavil or question.

We pass to the law, which is equally as clear.

Part II.

ON THE LAW.

It cannot be contested that François Langlois had a right, under the New Madrid Act, to locate, in lieu of his land in New Madrid county injured by earthquake, two hundred arpents of other lands in the Territory of Missouri; for all the facts necessary to the existence of the right are placed beyond dispute by the action of the Recorder of Land Titles, who, invested with the plenary powers of investigation and judgment, adjudged in the last resort that the facts were proven, and that the right existed.

That upon so adjudicating, and upon the relinquishment by Langlois to the United States of the land confirmed to him in New Madrid county, the Recorder of Land Titles granted the certificate made by the law conclusive evidence of his right to locate a like quantity of land elsewhere in the Territory, is proven by the certificate itself.

That, the said claim and certificate being assignable, he sold and conveyed them, by his attorney in fact, to Samuel Hammond, for six hundred and forty dollars, which was paid, is proved by the instrument of cession, by his convey-

ance subsequently to Story, and by the utter absence during fifty-seven years, of any claim to any interest in the certificate or the land located, on the part of Langlois, any repudiation by him of the act of Story, in making the transfer as his attorney in fact, any denial of the mandate alleged, any reclamation against his action as such attorney in fact. After the lapse of more than half a century of years, authority from him to Story, in writing, full and plenary, and his assent to the transfer, would be presumed; and the presumption would be equivalent to full proof, even if he had not made the subsequent conveyance.

That Hammond sold one undivided half-interest in the claim to Elias Rector, before or in 1820, is certain, by the joint application for the survey, and by the conveyance of himself and and his wife; and it is made certain that he afterwards sold or ceded to him his remaining interest, by the total absence of any claim on his part to any interest in the claim, certificate, or lands, for fifty years, and by the fact that he has never been known, nor has any person in his right been known, during half a century, to unite in any effort for the confirmation of the location, to expend money, or employ counsel in regard thereto, or to be heard of in any way in connection therewith. As to Story, he formally conveyed his interest to Hammond and Rector, in 1821, to perfect title.

Story had possession of the certificate, and assigned to Hammond. Hammond and Rector jointly applied for the survey. Rector afterwards had the certificate, and at his death it came to his son; and he and his son have for fifty years asserted the claim. This has been as clear a *possession* of the claim, as to exercise exclusive control over land is possession. And everything will be presumed in favor of this possession, necessary to maintain its legality.

In favor of long possession, everything that has been done shall be presumed to have been rightfully done; and though it do not appear to have been done, the law will presume

that whatever was necessary has been done.—Strother *vs.* Lucas, 12 Peters, 411.

The assignment of a military warrant, under which a claim has been asserted for many years, may be presumed to be genuine, and for a valuable consideration.—Lewis *vs.* Baird, 3 McLean, 57.

After a long possession in severalty, a deed of partition may be presumed.—Hepburn *vs.* Auld, 5 Cranch, 262.

In Strother *vs.* Lucas, (12 Peters, 452,) the Court said: "After this lapse of time the legal presumption of the validity of both deeds would attach, by the maxim, that, in favor of long possession and ancient appropriation, everything that was done shall be presumed to have been rightfully done; and though it does not appear to have been done, the law will presume that whatever was necessary has been done."

And the same case settles that Hammond and Langlois and Story and all persons claiming under them have slept on their claims, if they had any remaining, so long, that they are to be deemed to have abandoned them, and that the title of Rector is to be deemed rightful under valid sales and cessions. It is too late now to impeach these.

In Mitchell *vs.* The United States, 9 Peters, 712, this presumption in favor of an ancient appropriation was applied against the Government. Anything that will make such an appropriation good will be presumed, if it *could* have had a lawful foundation: *for whatever may commence by grant is good by prescription.* So a long possession of Indian lands warrants the presumption that it was founded on an Indian deed duly confirmed, or on a license or grant from the Government. There is prescription by lapse of more than fifty years against Hammond, and assertion of exclusive title even in Henry M. Rector, the son and heir, for nearly or quite forty years. A conveyance by Hammond will be presumed.

In Stoddard *vs.* Chambers, 2 Howard, 316, forty years having elapsed since a deed purported to have been executed, and a claim under it having been continually asserted, the

Court held that regular proof of it might well be dispensed with.

The act of 26 April, 1822, to perfect New Madrid locations, recognizes the right to assign the certificates granted to the claimants, by the phrase, "the holders and locators of such warrants."

The act of 1843 did the same by giving the "owners of the warrants" the right to enter lands in lieu of those located that had been sold.

The certificate of the Recorder of Land Titles, in this case, authorizes François Langlois, or his legal representatives, to enter the 200 arpents of land.

On the 3d of July, 1828, the Commissioner of the General Land Office wrote to the Register at New Orleans, that in his opinion persons who had purchased from pre-emptioners might be considered their legal representatives. And in 1816 the Attorney General decided that a purchaser at Sheriff's sale was entitled to the patent.—Instr. & Opin., 740, 5.

In Galt *vs.* Galloway, 4 Peters, 339, the Court said: "The possession of the warrant by Westfall is the only evidence of his right to make the location; and this has uniformly been considered at the Land Office as sufficient authority. Letters of attorney were seldom if ever given to locators, because they were deemed unnecessary. The entry could only be made in the name of the person to whom the warrant was issued or assigned, so that the locator could acquire no title in his own name, except by a regular assignment."

Entries by assignees were always sanctioned and allowed. So it was in cases of pre-emption.—Letter of the Commissioner, Instr. & Opin., 395. Opinions of Atto. Gen. Rush, Id., 2, 3. Opinion of Atto. Gen. Butler, Id., 83.

See also Letter of the Commissioner, October 15, 1829, to the Register and Receiver at St. Helena, and 17 May, 1830, to the same officer. Instr. & Opin., 740, 741.

Lessee of French and wife *vs.* Spencer, 21 Howard, 226, was the case of an assignment, by power of attorney, of a

warrant authorizing the location of three hundred and twenty acres of bounty land. The instrument was precisely like that given by Langlois to Story. It contained a power to locate, and conveyed the land that might be located. The court held it valid; and that the patent *related* to the date of the entry, so as to inure to the benefit of an intermediate *bonâ fide* alienee.

It is proven that application for the survey was made by Hammond and Rector, assignees of Langlois, on the 17th of January, 1819, with sufficient certainty of designation of the lands fixed upon by the claimant; and this application was made, as it should have been, to the Surveyor General of Illinois and Missouri.

It is proven that the order of survey was given by the Surveyor General; but if it were not proven, it would be presumed. The survey was made by a Deputy Surveyor; and the presumption is that it would not have been made without an order. *Omnia ritè præsumuntur acta donec probetur in contrarium:* and proof that that survey was not made without an order, if one was necessary, cannot be required after the lapse of fifty years.

A survey is made by a Surveyor under oath, and is evidence as to all things that are properly within the line of his duty. It is evidence, because officially done under oath in the discharge of his duties to the Government and the public.—Elliott *vs.* Pearl, 10 Peters, 441.

In Russell *vs.* Transylvania University, 1 Wheat., 432, the Court said: "By the land laws of Virginia, the return of the Surveyor into the office is the only legal identification of the land on which the right of the individual attaches."

In Craig *vs.* Bradford, 3 Wheat., 594, under a warrant of the Governor of Virginia, a thousand acres of land were surveyed by a Deputy Surveyor, who never returned the surveys to the office of the principal Surveyor of the county, (being killed by the Indians,)but one of the company took possession of the few notes after his death, and lodged them in the

office. It did not appear that the Deputy Surveyor had in his possession a warrant authorizing him to execute the survey; and all the lines were not run.

The Court decided that the certificate of the Surveyor, stating that the survey was made by virtue of the warrant, was sufficient evidence that the warrant was in his possession, and the warrant was held to be described in the certificate with sufficient certainty to prove that the Surveyor acted under its authority.

Also, the Court held that the failure of the Surveyor to run all the lines on the ground, or to see it plainly bounded by natural bounds or marked trees, or to observe other *directory* provisions of the law, could not invalidate the survey, because the party had no power to control the conduct of the Surveyor, and the neglect of that officer to perform his duty could not deprive the party of his title.

And, also, the Court held that the survey, though in fact made by a Deputy Surveyor, was in point of law to be considered as made by the principal, and consequently his signature to the plat and certificate was a sufficient authentication of the survey to entitle the party to a grant.

In Taylor and Quarles *vs.* Brown, 5 Cranch, 234, (also a case from Kentucky,) the Court held that it was not necessary that the warrant should have been in the hands of the Surveyor; that it was sufficient authority for him to survey the land, if he knew that such a warrant existed; and if it had been necessary, the presumption arising from his making the survey was strong that he had it, and sufficient proof until the contrary should be shown.

The survey was made by a deputy surveyor, and he being killed, and his papers preserved by his attendants and delivered to the Principal Surveyor, the latter made out the plat.

The Court held the title valid; and said, also, that the Surveyor's failure to *record* the survey could not invalidate it. Every surveyor was required to return a list of his sur-

veys to the College of William and Mary. The Court said that it could not be contended that the surveys were void if the list was not returned. Several other things were by the law required to be done by him; and the Court said that his neglect to do them could not vacate his surveys.

The survey, the Court said, *is the appropriation*. The land was actually marked and bounded, and the marks and bounds were a matter of public notoriety. That was notice enough to all other persons.

And the Court thus stated the general doctrine as to the presumption of performance of official acts: "the act of recording was a *duty* which the officer was bound to perform. The complainants could not compel him to perform it, and therefore they ought not to suffer, if he neglected it."

In that case there was a grant; and the Court said that after a lapse of thirty years all the necessary prerequisites were to be presumed.

In the present case, the statute of 1815 expressly makes it the *duty* of the Principal Deputy Surveyor to return the plat and a notice to the Recorder. But he was forbidden, by higher authority, to do so, or to record the survey. Rector and Hammond could not *compel* him to do either. Therefore they could not suffer by his failure to do either.

"Everything done by a deputy surveyor," the Court said, "is supposed in law to be done by the principal. * * If the deputy acts, it is in the name of the principal. For making out a plat and certificate from the field-work is a mere mechanical operation. It may as well be done by another as by the officer who actually ran the lines."

The Court held the *survey* an appropriation of the land. It was no longer waste, vacant, or unappropriated land. And they said: "Lapse of time cannot *enfeeble* a claim; it either destroys it altogether, or it has no effect."

In Lessee of Harris *vs.* Buchan *et al.*, 1 Wash. C. C., 191, it was held that a survey made and returned, and having every appearance of regularity, must be taken as, and is

presumed to be regular, until the contrary is shown. It would be very mischievous, the court said, if a man, having a paper-title, apparently regular, should be compelled, in asserting his title, to prove that the public officers performed their duty. It would be substituting a title dependent upon the uncertain tenure of men's memories for a written one.

In Griffith *vs.* Bradshaw, (4 Wash. C. C., 171,) the original survey and plat were produced, and the retracing of the lines proved. The court said, "That the surveyor, a public officer, acting under the sanction of his oath, has made the survey in a legal manner, is to be taken as a fact, unless the contrary be proven; and the burthen of this proof lies upon the party who questions the legality of the survey. . . It may become necessary to produce the original survey, and frequently to have the lines retraced; but if, in this examination, the identity of the land is established, either by its own marks or those of adjoining tracts, it is sufficient."

In the present case the original survey *is* produced, and the lines *have* been traced. There is no doubt that the survey was *made*, and made by a regular, competent, sworn deputy surveyor.

It has been objected that the protocols now offered in evidence and so amply proven, were found, in 1850, in the possession of Rector himself; and the fact that he had not before relied on the alleged survey of 1820 has been in divers ways commented upon. We have sufficiently explained that, by the simple and undeniable facts of the case; and as to his possession of the protocols, except that originally deposited in the office of the Surveyor General at St. Louis, they were exactly where they should have been, and where reasonably and naturally it was to be expected they would be. He had possession of the muniments and sinews of his own title.

Speaking of ancient documents, purporting to constitute part of the transactions themselves, Greenleaf says, (1 Ev.,

§ 142,) that care is to be taken, in the first place, to ascertain their *genuineness:* "and this may be shown, *primâ facie*, by proof that the document comes from the proper custody, or by otherwise accounting for it. Documents found in a place in which, and under the care of persons with whom, such papers might reasonably be expected to be found, are in precisely the custody which gives authenticity to documents found within it."

In Bishop of Meath *vs.* Marquess of Winchester, (3 Bing. New Cas., 183,) where the House of Lords requested the opinion of the Twelve Judges, a case, purporting to be a case stated for the opinion of counsel by a former bishop, had been found among his papers after his death, and the question was, whether it was admissible in evidence. TINDAL, Ch. J., said that the papers were found in a place in which, and under the care of persons with whom, papers of the late bishop might naturally and reasonably be expected to be found: and, he said, "that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper places of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is where documents are found in *other* than the proper place of deposit, that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and proper, though differing in degree; some being more so, some less; and in those cases, the proposition to be determined is, whether the *actual* custody is so reasonably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently

genuine to render a document admissible, appears from all the cases."

Old grants to abbeys, he said, had been *rejected*, as evidence of private rights, where the possession of them appeared altogether unconnected with the persons who had any interest in the estate, * * * where the possession of the documents *was unconnected with the interests in the property.*

An old chartulary was held admissible, of a dissolved abbey, *because found in the possession of the owner of part of the abbey lands*, though not of the principal proprietor. The proper custody would have been the Augmentation Office; but the court said the place of custody was where it might be reasonably expected to be found.

So he held the case admissible, because, though relating to the affairs of the See, it also related to the private interests of the bishop, and might reasonably and naturally have been expected, even as relating to the See, to be found at the mansion house.

In Neale *vs.* Samples, 8 Ad. & El., 151, it was held that a document more than thirty years of age was admissible in evidence without proof of execution, if produced by persons whose possession of it might be reasonably accounted for, *although their custody was not the strictly proper one.* The document there was a deed of settlement executed by defendant's father, and found among the papers of the father. It was put in as proving itself, and objected to as not coming from the proper custody. The counsel objecting insisted that *it ought to have come from the custody of the party claiming under it*, not that of the party against whom its provisions operated. And he quoted from Viner, "It is hard to prove ancient things, and the finding them in such a place [among deeds and evidences of land,] is a presumption they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty."

All the judges held that, though not the strictly proper custody, it was enough if it was one that might be reason-

ably and naturally explained, *though not that of the persons strictly entitled to the possession.*

In our case, the protocols *were* in possession of the party strictly entitled to their possession; and were entitled to be read without any proof whatever.

But we need not ask that. The proof is ample that the survey asked for was made by James S. Conway, Deputy Surveyor, and that the lines were duly and legibly marked, and the plat and notes of the survey made out by him in triplicate, certified on the 16th of July, 1820; and that, of the three originals, one was deposited in the Surveyor General's office at St. Louis, was transmitted thence in 1832 or 1833 to the office at Little Rock, and there remained until at least 1838; and the others were delivered to Hammond and Rector: that these were preserved, retained by Elias Rector until his death, came afterwards to the possession of his son, and were by him filed in the Surveyor General's office at Little Rock, on the 18th of June, 1850, and one of them withdrawn by him, on the 12th of September, 1850, and transmitted to the General Land Office.

And it is proven beyond any dispute, that, under the instructions and decisions of the General Land Office, the Attorney General, and the Secretary of the Treasury, in force and enforced from the 16th day of July to the present day, the plat and notes of survey returned in 1820 could not be recognized and approved by the Surveyor General as constituting a regular, valid, authorized location; could not be recorded as such in his office; could not be transmitted by him to the Recorder of Land Titles; could not, if they had been transmitted, have been recorded by the Recorder of Land Titles; nor any certificate granted by him thereon, nor by the Surveyor General, to entitle the claimant to a patent.

The Court of Claims has found all these facts to be proven, and that the claimant did all things that the law required him to do, to perfect his location; and has said that the

rest was the statutory duty of the officer, which, if it *ought* to have been done, the law regards *as* done. All its judges believe that upon the facts and by the law, Rector is the proprietor by equitable title unimpeachable, of the land as located in 1820. But the majority of the court have felt compelled to say as follows :

"But the Supreme Court has also declared that before the New Madrid or injured lands '*shall revert to and become absolutely vested in the United States,*' the plat of the location and the notice in writing designating the tract located must be returned to the Recorder of Land Titles. The precise point presented by this case has, we believe, never been presented to the Supreme Court, but the declaration or construction to which we have alluded runs through six of the decisions of the Court, beginning with 13 Peters and continuing to 19 Wallace. (Bagnell *vs.* Broderick, 13 Pet., 436 ; Barry *vs.* Gamble, 3 How., 32 ; Lessieur *vs.* Price, 12 id., 57 ; Hale *vs.* Gaines, 22 id., 144 ; Rector *vs.* Ashley, 6 Wall., 143 ; Mackay *vs.* Easton, 19 Wall., 619.) With that reiterated opinion of the Supreme Court before us we do not feel at liberty to regard it as the mere *dictum* which might drop from a single case. While we do not feel satisfied with the construction which has been directly or indirectly given to the statute, and while we think the facts of this case will present a substantially new question to the Supreme Court, upon which it will not be bound by its former rulings in other and essentially different cases, yet still we do not feel at liberty to disregard what the Court of last resort has so repeatedly said, and deem it best to leave to that tribunal the duty of correcting its errors, if errors they be. We must therefore decide that no location was ever made by Hammond and Rector, and that their representatives have no title, legal or equitable."

The Court here will believe that we must have had a firm conviction that the law of the case was in our favor, to venture to assert the claim and argue it in the Court of first re

sort, against what *appear* to be so many decisions of the appellate Court, ruling against us upon the point on which it has declared the New Madrid cases to depend. It seemed to be considered almost argument enough there against us, to say, as if it were matter of amazement and reproach, that we undertook to show that this Court had from first to last mistaken the law and fallen into error.

Oppressed by the magnitude of the task that we had undertaken, yet we have never doubted that we should demonstrate to the Court that it has labored under an error in regard to *facts*, and has only *seemed* to depart from the doctrines firmly established by itself long ago; and the Court will not believe, until it has heard us fully, and carefully considered the matter as it is now presented, that we could, notwithstanding the vast odds against us, and the immense weight of its decisions, have convinced the four judges of the Court of Claims, and obtained a decision really sustaining at all points our opinion, by any other means than a true and sound exposition of the law. And this is too great and too high a tribunal to hesitate to correct any errors into which it has fallen.

But there is yet somewhat to be said, before we proceed to review the decisions which have compelled the Court of Claims, not to *decide*, but to *decree*, against us.

The act of 1815 itself defines what a *location* under it is. It is, as a location of a warrant always has been everywhere, and as held by all the courts, the *survey*. The rest is directory to the officers, of what they are to do *after* the location.

And it is quite evident that when the claimant had designated with sufficient certainty the land which he proposed to take, had formally applied to have it surveyed, had offered to pay the costs of survey, had shown the land to the Deputy Surveyor, seen to it that he surveyed it and returned the plat, notes, and certificate of survey to the office of the Surveyor General, and had paid for and obtained, for his own security, a copy of such plat, notes and certificate, he had

done all that he was required to do, and all that, by the law everywhere pronounced, was necessary to constitute a complete location.

If, after making his application, he had neglected to see to having the survey made, there would have been no location, because, without a survey, the land could not be severed from the public domain. But if, when the Surveyor had made out and certified a plat and field-notes of the survey, after surveying the land and marking the bounds, limits, and corners, and had delivered a duplicate to the claimant, the duplicate retained by him had been lost or destroyed, or he had even been killed while on his return to St. Louis, and the duplicate in his possession destroyed, the claimant would not have lost the land, but it would have been sufficient for him to file in the Surveyor General's Office the duplicate delivered to himself, or even a copy of the field-notes only; and his location would have been complete. The formal return and plat would be made out in the office from the field-notes; as, in practice, the plats always were.

For no one can lose a perfected right, by the loss or destruction of the evidence of it.

If we should admit, or the Court should still hold, that there was no location, no right to the land, until the plat and notice were sent to the Recorder of Land Titles, still we could not lose the land, because there would be applied, to prevent injustice and the most grievous wrong, a principle than which none is better settled, and which never can be abrogated while there are Courts of Equity in the world.

If the non-transmission to the Recorder of Land Titles, by the Surveyor General, of the plat and notice required by the act of 1815 to be sent to him, to enable him to grant his certificate, had been the consequence of refusal or neglect on the part of the Surveyor General, the claimants, having done all that by law they were required to do or could do, who had applied for the survey, designating with sufficient certainty and identification the land to be surveyed, had had

the survey made, and paid the costs of survey, had seen it returned to the proper office, that of the Surveyor General, and the plat and description of the survey filed and numbered there, and had obtained from the Surveyor copies for their own protection, could not have been prejudiced by the Surveyor General's refusal and neglect; for his wrong being the wrong of the Government, which could not disavow it and at the same time enjoy the benefit accruing from it, and would be estopped to rely upon it against the party who was helpless to prevent it. No man can gain a benefit lawfully by his own wrong, neither can any Government; and if a Government is not always responsible to the injured parties, for wrongs and illegalities of its officers, by which they suffer, yet, if it seeks to have the profit of those wrongs, it thereby makes them its own.

That has always been the doctrine of this Court. In Lytle *vs.* The State of Arkansas, 9 Howard, 314, it said:

"It is a well established principle, that where an individual, in the prosecution of a right, does everything which the law requires *him* to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." There the party proved his pre-emption and offered to pay the price of the land, and the Court said, "Nothing more could be *done* by him, and nothing more could be required of him, under the act."

It is not necessary to cite authorities to establish the soundness of the great axioms which the law has taken from the great code of eternal justice. They need no proof. God has made them the law for all mankind; and there is no code in which they are not contained.

Est enim lex nihil aliud nisi recta et à numĭne Deorum
tracta ratio:
Lex vera, atque princeps, ratio summi Jovis.

The Surveyor General did not consider the location invalid, nor refuse nor neglect to transmit the plat and notice.

But he *did* not do so, because his superiors forbade it. They did so on frivolous grounds and for reasons utterly erroneous; and the Government is certainly no less responsible for what is done by its higher officers, than for what is done by those who are below them. *It* ordered the Surveyor General not to transmit the plat and notice; for it is not only here justifying what they did, and insisting on their objections, but demanding that the Court shall deny Rector his right and title, because his father did not procure its officer to do what its higher officers, by right of superiority, peremptorily forbade them to do.

The United States cannot avail itself, to defeat a claim, of the omission to do acts which its own officers, either by fraud, or error, or ignorance, prevented.

The Commissioner of the General Land Office laid down the principle on the 19th of July, 1836, in regard to preemptions, that when an individual was entitled to one, and did, as far as he was able, all that he was required to do under the law, and was prevented, *by any circumstance on the part of the Government*, from completing his entry within the time prescribed by law, it was an invariable principle to admit his claim. Instr. and Opin., 639; and no doctrine is better settled in this Court.

Taylor and Quarles *vs.* Brown, 5 Cranch, 241.
Craig *vs.* Bradford, 3 Wheaton, 494.
Stringer *vs.* Lessee of Young, 3 Peters, 338.
Cunningham *vs.* Ashley and Beebe, 14 Howard, 377.
Castellero's case, 2 Black, 97.
Glasgow *vs.* Hortiz, 1 Black, 602.

If it had been the duty of the Surveyor General in this particular case, in 1820, to transmit plat of survey and notice to the Recorder of Land Titles, it would be presumed that he did so. The maxim, *Omnia ritè acta præsumuntur, donec probetur in contrarium*, applies to all public officers, in

favor of those who have rights dependent upon those officers having done their duty.

Griffith *vs.* Bradshaw, 2 Wash. C. C., 172.
Taylor *vs.* Brown, 5 Cranch, 241.
Wilcox *vs.* Jackson, 13 Peters, 511.
Polk's Lessee *vs.* Wendell, 5 Wheaton, 293.

Why shall not this presumption hold in this case? Because the Surveyor General was forbidden to recognize such surveys, and it is not allowable to presume that he disobeyed these orders and became a rebel to his superiors. Then, as we cannot, for that reason, have the presumption, the Government shall not impute it to us that this was not done which it forbade; but it shall be *considered* as done, as against the Government, because it wrongfully prevented it.

The act of April 29, 1816, required the Surveyor General to perform *all* the duties required by law to be performed by the Principal Deputy Surveyor, and specially directed that he should transmit to the Registers of the Land Office, general and particular plats *of all the lands surveyed or to be surveyed*, and forward copies to the General Land Office; and *all* plats of surveys, &c., pertaining to *any* office theretofore established or authorized, for the purpose of executing or *recording* surveys of lands within the Territories of Illinois and Missouri, were to be delivered to such Surveyor General. All provisions of former laws repugnant to or inconsistent with these were repealed.—3 Stat., 326.

And the act of 15th June, 1832, (4 Stat., 531,) creating the office of Surveyor of the Territory of Arkansas, required the Surveyor for Missouri and Illinois to deliver to the new officer all the maps, papers, records, and documents *relating to the public lands and private land claims* in the Territory of Arkansas. There is no provision, nor ever was any, requiring any other office or officer to furnish such surveys.

Which shows that, in conformity to the act of 1816, all the surveys of private land claims of every kind were kept

in the office of the Surveyor General for Illinois and Missouri. And if, after the passage of the act of 1816, it continued to be necessary, under the New Madrid Act of 1815, for all surveys to be filed and recorded in the Surveyor General's office, that certainly made the return of the survey there a location. The act of 1815 itself defined the meaning of the word "location," by the words, "the *locations* made, on the application of the claimants, *by the Principal Deputy Surveyor for said Territory*, whose *duty* it shall be to cause a survey thereof to be made, and to return a plat *of each location made*, together with a notice," &c. If there is any virtue in language, and if words *could* be used that would make it so, the survey was the location. What *other* words can any ingenuity add, to make it more plain? What others added would not make tautology? What words substituted would make the meaning and intention clearer?

As Marcadé says of a provision of the French Code: "*La disposition de la loi ne nous paraît point obscure; elle nous semble, all contraire, très-claire, ou ne pent pas plus claire. Elle est très intelligible en vérité. Il semble même que le législateur ait vouhe repousser d'avance cette singulière prétention des commentateurs.*"

The *survey* severed the land from the public domain. The plat was but evidence of it. If anything more was necessary, the law does not say so. The plat is a plat *of the location*. Of course it was made out after the location had been effected; and if anything more *was* necessary, it *could* have been nothing more than the making and filing of the plat. A levy is made when the officer takes the property, though his return on the writ may be the only sufficient evidence of it. In that sense it may be admitted that making out the descriptive notes of the survey, from the field-notes, in such form and certified as the rules of the office required, and filing them in the office of the Surveyor General, were necessary to constitute a complete location,

because until then and without that there would be no competent official evidence of the survey.

As to the plats, they were not necessarily made out and filed by the Deputy Surveyors. Often, perhaps generally, these were less competent to do that work, than the draughtsmen in the office. From the descriptive notes, if properly made out, any draughtsman could make the plat; and the Surveyor General could, if he chose, accept the field-notes, made on the ground, as a sufficient return of the survey. It was as competent for him to have the rest done in the office, as to do it by the Deputy Surveyor, there or in the field.

We consider that upon the principles established by this Court, as we have stated them, we might admit that the Court had not been led into any error in the case of Bagnell *vs.* Broderick, and the cases afterwards governed by it; and that to make the location of a New Madrid warrant complete, a plat of the survey and a notice from the Surveyor General, transmitted by him to the Recorder of Land Titles, and by him received, were indispensable; and yet, if that was wrongfully forbidden and prevented by the high officers of the Government, their non-transmission and receipt cannot, in a suit between the claimant and the Government, when no rights of third persons have intervened, be urged against the claimant by the Government, but it will, to all intents and purposes, be, as against the Government, as if it had been done.

But if the location was complete, when the survey had been made in accordance with the application, and was returned to and filed in the office of the Surveyor General, and by him received and approved, then, certainly, there can be no pretext for saying that the officers of the Government could prejudice our rights, by forbidding the Surveyor General to perform a duty imposed on him by law, and necessary to be performed to enable us to obtain the Recorder's certifi-

cate, and a patent for the land located. It is a greater wrong to prevent one from having the enjoyment of a right or the benefit of a title, that has become complete, than to prevent that being done which is indispensable to the completion of a right as yet incomplete.

Wherefore, with profound deference, but with the frankness due to an intimate conviction, we discuss the former decisions of this Court.

Upon general principles, never denied in any Court, the location of a warrant or order of survey, or of a grant for quantity or made with reference to locality, is complete when surveyed in the mode prescribed by law or the terms of the grant, and upon the return of such survey to the proper office where it is to be examined and approved, and to remain and be of record, subject to no further revision, and not to be disputed as a survey.

And if the location of a New Madrid claim did not so become complete, it is the only known exception, and the dominion of the general principle must be excluded by some provision of the New Madrid Act, requiring more.

We cannot find that this Court has ever meant to deny the general principle, to establish which no court has done more. We cannot find that it has ever meant to hold that more was needed to make a complete location, than application, survey, and return of the survey in due form to the office where it was to become final as a survey by being adopted there, and there to remain and be recorded. It has simply been led into error as to that office.

In Bagnell *vs.* Broderick, 13 Peters, 436, the Court said:

"The notice of location made by the claimant with the Surveyor General is no part of the evidence on which the General Land Office acted; but the patent issued on the plat and certificate of the Surveyor, returned to the Recorder's office, and which was by him reported to the General Land Office. The United States never deemed the land appropriated *until the survey was returned,* for the reason

that there were many titles and claims, perfect and incipient, emanating from the Provisional Governments of France and Spain, and others from the United States, in the Land District where the New Madrid claims were subject to be located. So there were lead mines and salt springs excluded from entry. Then again, the notice of entry might be in a form inconsistent with the laws of the United States; in all which cases no survey could be made in conformity to it.

"If no such objection existed, it was the duty of the Surveyor to conform to the selection made by the claimant having the location certificate from the Recorder. Still, the only *evidence* of the location recognized by the Government as an appropriation was *the plat and certificate of the Surveyor*. Such is the information obtained from the General Land Office. The *location* referred to in the act is the plat and certificate of survey returned to the Recorder of Land Titles; because, by the laws of the United States, this is deemed the first appropriation of the land."

In considering the meaning and intention of any statute, the first requisite of a judicial opinion is entire accuracy in quoting the language of the statute. It is never admissible to substitute another phrase for one used in the law, and discuss *its* meaning as if the law contained it; because no two phrases are perfectly synonymous. Now the New Madrid Act does not use the expression, "the plat and certificate of the Surveyor." Literally that means the plat and certificate *returned by* the Surveyor who made the survey in the field; the very paper which, more briefly called "the Survey," he returns to and files in the office of the Surveyor General.

The phrase used by the law is, "a plat of each location made, together with a *notice* in writing, designating the tract thus located, and the name of the claimant on whose behalf the same shall be made." The words, "a certificate" and "a notice in writing" are not synonymous. The

"location," the *Court* said, "IS the plat and certificate of survey." The *law* says that the plat is to be *of the location already made;* and the notice, to designate the tract *already located.* How, then, could the plat and notice BE that location, whereof one was to be the plat, and the other to designate the land that *had been* located?

So also the opinion speaks of "the plat and certificate of the *Surveyor.*" By the law, the plat and a notice were to be returned to the Recorder by the Principal Deputy Surveyor, to whose office all surveys were returnable, who was to record them, and who alone could certify copies of them.

Certainly the law does not *say* that the plat and certificate of survey, or notice in writing, are to BE the "location;" but, on the contrary, that the location is to be made by the Principal Deputy Surveyor *or under his direction,* which means that the *location* may be *made* by one of his Deputies; and that it shall be the duty of the Principal Deputy Surveyor to return a plat of that location, and a notice designating the land *thus* located, to the Recorder.

Moreover, it is the *party,* who is "authorized to locate." He locates by the survey which he procures to be made, and which he pays for, and all that he has to do ends, before the duty of the Principal Deputy Surveyor to return a "plat of the location" begins.

And if we add one further fact, that the law unquestionably meant that the Principal Deputy Surveyor should give to the locator a certificate, stating the circumstances of the case, and that he was entitled to a patent, nothing *can* be clear, if it is not clear that returning (i. e., simply, *sending, transmitting*) the plat and notice to the Recorder was no part of the location at all.

The "survey" was *returned* to the Surveyor General's Office. Of course the location was not deemed complete until then, because the field notes so returned were the only *official* evidence of the survey, which was itself the location.

And all the reasons given by the court apply to *this* return,

and not to any report or notice to the Recorder of Land Titles. *All* the surveys of *all* claims were in the office of the Surveyor General. There were *none* left in the office of the Recorder. It was the Surveyor General only who could tell whether a private claim was interfered with by the location. The Recorder could not. The Surveyor General only could tell whether a lead mine or salt spring was interfered with. The Recorder could not. No plats, of even the *public* surveys, were in the Recorder's office. He never had any, except the plats of private surveys, or rather of *particular* ones. The Surveyor General was the officer, and the only one, authorized to determine whether the "*notice* of entry" was in a form consistent with the laws of the United States, and whether, therefore, a survey could or could not be made in conformity to it. The Recorder never even *saw* the notice, *i. e.* the application for survey.

In that case the Court expressly said that the plat and the certificate of the Surveyor were the only "*evidence of the location* recognized by the Government;" and that was true, in this sense, that it was only by means of them that the Recorder's patent-certificate could be obtained. But it was not true that these WERE, as the Court in the next breath said, the location. Being *it*, and being the *evidence* of it, are two very distinct things. The return of a Sheriff is *evidence* of service, the *only* evidence that suffices; but the return IS not the service.

If the Surveyor General had *refused*, in any case, to send up to the Recorder the plat and notice, when a regular survey had been made, or had died without doing it, or had sent them and they were lost and destroyed on the way, would there have been no location? If he had refused, he could have been compelled to send up the *evidence* of location. If so compelled, would he, in obeying, have *made* the location?

One must admit that the opinion is wanting in accuracy of expression, and presents no distinct idea of location. It therefore cannot be an authority as to that; for it is impos-

sible for the mind to assent to the proposition that an act or thing is at once an act or an effect and the evidence of that act or effect.

The Court said, "The location referred to in the act is the plat and certificate of survey returned to the Recorder of Land Titles; because, by the laws of the United States, this is deemed *the first appropriation of the land.*" Quod gratis affirmatur, gratis quoque negatur.

What is "*this*," that is so deemed? Is it the location, or the plat and certificate of survey, or the return of these? By what laws of the United States is "this" deemed so? And, *is* the location the plat and certificate returned, *because* this is deemed the first appropriation of the land? Whatever is the location, *it* is the appropriation of the land. But *how* does that prove that the plat and certificate returned *are* that location.

Moreover, it was another grave defect in the decision, that it gave no consideration to the consequences that might result from it. No test of the soundness of a legal proposition should be overlooked before adopting it; and especially not that test which is the best and most certain.

If the return of the plat and notice to the Recorder was "the first appropriation" of the land, then it was unappropriated land until that return took place. Now, as the testimony of Conway and Hesse and Exhibit or Schedule F show, the practice was, in a large part of the cases, not to return the plat and notice for many years after the survey; and, from an early day, not until the adjoining lands had been surveyed, so that a plat of these *and* the particular survey could be sent to the Recorder together.

No matter what the reason may have been, such was the rule; and under it the plat and notice of this location could not be sent up until the adjoining lands had been surveyed, in 1838. If, in the meantime, the land was unappropriated, would not an intervening entry or location hold the land? Would it not do so, in the case of *any* location, indisputably

valid, if another entry or location intervened while the Surveyor General, delaying year after year, for one reason or another, did not send the plat and notice to the Recorder for ten years?

And if there had been no possible dispute or doubt, nor any question, as to the validity of *our* location, but the Surveyor General waited for the survey of the adjacent country in 1838, to send to the Recorder a connected plat, would not the reservation of 1832 have utterly destroyed our valid location?

It was undoubtedly correct to say that the notice or application was no part of the evidence on which the General Land Office acted; (for nothing went to the General Land Office, but a plat sent direct by the Surveyor General, and the Recorder's final certificate); and that the United States never deemed the land appropriated until the *survey* was *returned;* though none of the reasons given for this by the Court made its return to the *Recorder* necessary. And it was correct to say that the plat and notice were *evidence* of the location. They were the *special* evidence on which the Recorder was to give a certificate in favor of the party, if, also, the first certificate was filed with him. But for all other purposes, the survey returned to the Surveyor General, with the application, were the evidence of the location; and they were the highest and the best. The plat and notice only made it known that *that* evidence was in his office.

We need only add, that the decision of the Court made the locator's right to own land which he had properly applied to locate, which was subject to his location, which had been properly surveyed by order of the Surveyor General, and the survey whereof had been returned, filed, examined, adopted and recorded, wholly to depend, nevertheless, upon the doing by the Surveyor General of a mere clerical and ministerial act, which he might do at once or not for years, which he might choose not to do at all, and for the non-performance whereof the locator was not in any manner answerable; because he had no power to compel performance

In Stoddard *vs.* Chambers, 2 Howard, 284, the plaintiff claimed under a Spanish concession, made in 1800, and the defendant under "an entry" made by one Peltier, of 160 acres of land, "by virtue of a New Madrid certificate, on the 24th of October, 1816. A survey of the entry was made in March, 1818, and a patent to Peltier was issued the 16th of July, 1832.

The *Township* in which the land was situated, "was surveyed in 1817, 1818 and 1819, and was examined in 1822. In 1823 the President, by Proclamation, directed sale of the lands in that Township.

Also, a small piece of the land covered by the plaintiff's concession, was included in the location and survey of *another* New Madrid claim (of Martin Coontz), the "entry" whereof was made in May, 1818, and the survey in July, 1818.

The concession of Stoddard was confirmed by act of Congress on the 4th of July, 1836, in accordance with the decision of the Board of Commissioners. It had been rejected by the Board in 1811, and confirmed in 1835.

The only question considered was whether the New Madrid location had been made "in conformity to law." The *location of* Peltier, the Court said, was made in 1816, and his survey in 1818; and there was no question that at both of these times the land was reserved from sale, and the sale of it was not authorized by law. It was reserved from sale by the act of 1811, because covered by an unconfirmed Spanish claim. But for that the New Madrid location would have been held valid; but as it was, the case decided nothing in regard to the question here.

In Barry *vs.* Gamble, 3 Howard, 32, the Court said, of the survey: "*Its* return by the Surveyor, with a notice of location to the Recorder, was the first appropriation of the land; and not the notice *to* the Surveyor General requesting the survey to be made." It was certainly true to say, that not

this *notice* or application, but a *survey* actually made in pursuance of it, was the location ; in a case, at least, where the application not being for subdivisions by the public surveys, *required* a special survey. But it was certainly a departure from well-established doctrine to say that a *return* of this survey, not to the officer of last resort in respect of the regularity and sufficiency of all surveys, but to one who had nothing to do with surveys, was "the first appropriation" of the land. It was to violate *two* well-settled principles ; 1st, that the actual survey and the return of it to the officer who is to approve and accept it, is the location ; and, 2d, that when the survey has actually been made, the failure by neglect or accident of the officer to record or return it *cannot* prevent the party from having title.

The Court did not say of the survey, "its return by the Surveyor *General*, with a notice of location to the Recorder, and not the notice *to* the Surveyor General ;" but it speaks of the Surveyor and Surveyor General, and evidently did not by the word "Surveyor" mean the Surveyor General. It would be hardly respectful to impute to the Court such looseness of expression. It evidently supposed that the survey *itself* was returned, by the Deputy Surveyor who made it in the field, to the Recorder of Land Titles. But the *plat* is not at all the *survey*. It is made out *after* the survey, at any time, from the field-notes. Neither was the notice the survey. It was simply a brief notification that the survey *had been* made, referring to the plat, as showing what it was. The Surveyor General was required to send general and particular plats to the Commissioner of the General Land Office ; but no one ever called these "surveys."

In Lessieur *vs.* Price, 12 Howard, 60, the New Madrid certificate issued on the 20th November, 1817, to Baptiste Delisle, and application or notice of location was made on

the 2d of June, 1821, specifying particular subdivisions of the public lands according to the surveys.

A survey was made by the Deputy Surveyor, dated 5th August, 1821, and filed 11th February, 1822, on which a patent certificate issued.

After the application was filed, and before the survey was *made*, the lands were selected by the State of Missouri under a grant by act of Congress.

The Court declared that the notice of location was the mere act of the party; that as the act of 1815 provided that, where a location should be made, the title to the land injured should revert to and vest in the United States, a *concurrent* vestiture of title must have occurred; the injured land must have vested in the United States *at the same time that title was taken by the new location*.

In point of fact, the Recorder of Land Titles took the relinquishment before granting his certificate of right to locate.

The Court said that the transaction was intended to be an *exchange* between the parties; and the question arose, When did the United States take title?

It does not seem to us that any exchange was intended. No *conveyance* to the United States was provided for or thought of. The act provided that, upon the location being made, the title to the injured land should *revert* to and *become absolutely vested* in the United States,—that is, should become so by operation of law.

The Recorder thought it best to take relinquishments. He may have been instructed to do so; but the *law* provided for none, nor gave the matter any of the requisites of an exchange.

The Court said that the plat and certificate were returned to the Recorder's office and there recorded, and in that office the law required all the official business to be transacted, and not in the Surveyor's office. It was true, they said, that the notice of location, and plat and certificate, were recorded in the Surveyor's office; but not to furnish evidence

to the claimant, but to have evidence there to show that the land was appropriated according to the New Madrid Act, and for the convenience of the Surveyor's department. That, the Court said, was the plain meaning of the law, and its import could not be changed by the practice pursued in the Surveyor's office; there the claimant could not go for record evidence of his location, binding the United States to an exchange of land. His entry was to be made by the Principal Surveyor, or under his direction. It was to consist of a plat of survey and a certificate describing the land, with the name of the claimant for whom the location by survey was made. *This return the Recorder had to examine, pass upon, and record.* If the location and *survey* had been *properly made*, then the United States assented to the exchange, and not until then.

In these statements there are several errors. The law did not require the Recorder to examine and pass upon the return, or "the plat and certificate of entry." The act of 1815 did require him to cause to be recorded in his office the notice and plat; but the act of 1816 made the Surveyor General's office the office of record for *all* plats, provided that no one else should have power to certify a copy of a plat, so that it should be evidence, and required every plat in *all* offices of record to be sent to the Surveyor General's office. After that, how could plats be sent to the Recorder's office, and remain there? and to what use? He could not certify a copy for the claimant; and the Surveyor General was required to send them to the General Land Office. The act of 1816 re-enacted, virtually, the act of February 28, 1806; and if plats *were* afterwards sent to the Recorder, he did not record them, and had no other use for them than to attach them to the locators' certificates. They were only evidence to him how the location had been made.

If the Court had known that certain acts required French and Spanish claimants to give to the Recorder written notices of their claims, with the plats of the surveys thereof, it could

hardly have thought that sending like plats and notices of location from the Surveyor General's Office was the location of the land.

The Court itself, in the very next paragraph, after stating the evils attendant on allowing parties themselves to locate warrants, expressly says, "and, therefore, the act of 1815 vested the power of *locating* the claim in the Principal Surveyor of the Territory."

The Court said that "the plat and certificate were returned to the Recorder's office and there recorded," and that "the notice of location and plat and certificate were recorded in the Surveyor's office." The *certificate* returned to the Recorder was a written *notice* sent him by the Surveyor General. That the Surveyor General did not record in his office. He recorded the plat, and placed the notes of survey and the Deputy's certificate on file.

He sent the plat and notice to the Recorder, not that he might examine or pass upon them, but because he had given the certificate of right to locate, and the legislator thought it best, that when the location should have been made, by a survey accepted by the Surveyor General, the final certificate, to entitle the locator to a patent, should be given by the Recorder, who alone could certify that he had a right to make the location. Having the proper evidence of the location furnished him, he could certify to both things, to the right to locate, because he had decided it; to the fact of location, because he had the evidence of it from the Surveyor General.

The claimant *could* go to the Surveyor General's Office for the record-evidence of his location. If the Surveyor General failed to furnish the evidence, it would still be in *his* office, and nowhere else. When a man enters land by purchase, he pays the Receiver for it, and that makes it his. He must first apply to the Register to purchase it, then pay the Receiver for it, and take his receipt, and then file that with the Register and get *his* certificate. Certainly the *purchase* is

complete when he has paid for the land. The further steps are but the process by which to obtain his title. Precisely such were the steps subsequent to the approval by the Surveyor General of the survey made under the New Madrid Act. What would it amount to, in the case of a purchase, to say that the purchaser could not go to the Receiver for evidence of the payment by him, binding the United States to convey the land paid for, to him by patent? True, he could not get the patent on the receipt or certificate of the Receiver, that he had paid for the land. The law prescribed another course; but he had made the purchase when he had paid for the land. The rest was routine.

Neither did the "entry" by the New Madrid claimant "consist of a plat of survey and a certificate describing the land." His entry consisted of his application for a survey, followed by the survey. The receipt of the Receiver is not the *purchase* of the land. It is the evidence of it. So the plat and notice were evidence, to the Recorder, of the location.

Neither could it be properly said that the evidence of a location bound the United States to an exchange of land. The land located became his by the location; and his *reverted*, upon such location, to the United States. To give him 640 acres for four lots of an arpent each, was not an *exchange* of lands. It was a gratuity, in the main, for the reverter was not provided for by way of equivalent or consideration. In an exchange, each party is both seller and buyer.

As to the *relinquishment*, the opinion of Mr. Justice McLean, in Bagnell *vs.* Broderick, shows that it was exacted as a condition precedent to granting the very first certificate—that of *right* to locate. And so it was required in this case.

The language of the act was, "that in every case where such location *shall be made,* according to the provisions of this act, the title of the person or persons to the land injured as aforesaid, *shall revert to* and *become absolutely vested* in the United States." If that does not mean that it shall *revert*

and *become* vested, by operation of law, and without any act of the party upon, and as a consequence, of the location, it is useless to endeavor to express anything by the use of legal language. The word "revert" means to *return to*, to go *back to*. Is a *reversion* effected by a *conveyance?* Is it not the exact meaning of "shall *become* vested," that it shall be so without the necessity of any act of the party? *Somebody*, in his superior wisdom, thought that Congress was not aware that it could not, by enacting it, make land revert to and become vested in the United States, and to remedy the supposed blunder, required *deeds* of relinquishment, which the law certainly did *not* require. The truth is, that the law was perfectly right. The legislator or person who drafted the law, knew what he was about better than the gentlemen who undertook to make up for his shortcomings. All the land injured in New Madrid county, to which there was any individual right, was held by virtue of Spanish and French claims, and not patented; and the provision in question was sufficient to *retain* the title in the United States. There was no need of a *relinquishment*. There can be no *re*-conveyance when there has been no conveyance.

All that the *law* directed or *authorized* the Recorder to do, on receiving the plat and notice, was, to cause it to be recorded in his office and to receive his fee; to furnish *a report* of claims allowed and locations made to the General Land Office; and either to deliver to the party *two* certificates in succession, the first *stating* that he was entitled to a patent, and the other entitling him to it in fact, (all which is too ridiculous to have been the intention,) or to issue the last-mentioned one when one furnished by some *other* officer should be filed with him. That *other* officer was the Surveyor General; and *he* was to state the circumstances of the case, and that the party was entitled to a patent before, or at the time of, sending up the plat and notice. As to *examining* and *passing upon* the *return* or the *survey*, there is not a word in the law; and the *survey* never went to him so

that he *could* examine *it* and pass upon it, to see if it had been "properly made."

Moreover, the recording of the survey in the office of the Surveyor General was not a matter of *practice*. It was *required* by the act of 1816; and no other officer could certify a copy of *any* survey; nor did any Recorder before Frederick R. Conway ever record a plat.

The Court has spoken in some of these cases of the return of the *survey* to the Recorder of Land Titles.

The act of 1816 gave to the Surveyor of the lands of the United States in the Territories of Illinois and Missouri, all the powers of the Surveyor General and of the Principal Deputy Surveyor for the Territory of Missouri, and required him to perform, as to lands in Missouri, all the duties of each. He had those powers and was charged with those duties, both as to the *public* surveys under the general system, and as to all claims that had been or might be confirmed by Congress, not already surveyed according to law; and he was required to send general and particular plats of *all* lands surveyed, or to be surveyed, to the Registers of the Land Offices in the Territory, and to forward copies of said plats to the Commissioner of the General Land Office.

This was not "to return the surveys" to either; but it was quite as much so as sending a plat and notice to the Recorder was. The act defines the meaning of the word "surveys," by the provision fixing the fees of the Surveyor of the public lands (afterwards called Surveyor General), "for recording the surveys executed by any of the Deputies, at the rate of 25 cents for every mile of the boundary line of such survey;" "for a certified copy of a plat of a survey in his office;" and by the phrase, "office established or authorized for the purpose of executing or recording surveys."

Neither the plat nor the notice was the survey, nor were both together the survey. The plat is no more the survey, than the drawing of a steam-engine *is* the engine; nor the notice, than the manifest is the cargo. Strictly speaking,

the survey is what is done in the field. But the papers returned by the Deputy Surveyor, the final and full statement of the survey, which the Surveyor General recorded, is also called the survey. The plat is "a plat of the survey."

And the acts of Congress have also, it is true, sometimes inaccurately spoken of *the plats* transmitted by the Surveyor General, as *the surveys*. Inaccuracy of language in the statutes is common, and the fruitful source of litigation. In regard to the New Madrid locations, it has misled the Court, and caused the same inaccuracy in its decisions. The *survey* was always recorded and remained in the office of the Principal Deputy Surveyor and, after him, of the Surveyor General. The plat was not the survey; for if it had been, *the survey* would have been *returned* to two places at once, to the Register or Recorder, and to the General Land Office, while at the same time remaining in the office of the Surveyor General.

In the act of April 14, 1814, (3 Stat., 122,) § 3, the Principal Deputy Surveyor was to return *the plat of survey* to the Register or Recorder; and in § 4, doing this is called "making return of the *surveys:*" and in the act of April 13, 1814, (3 Stat., 140,) § 1, the Surveyor of the lands south of the Tennessee, was to return general and particular plats of confirmed lands to the office of the proper Register; and to make "*a like return of the plats* to the Commissioner of the General Land Office:" and yet § 2 speaks of the *surveys* returned to the office of the Register, and the plats returned by the Surveyor, to the General Land Office.

The act of 1816 remedied all the confusion by providing that the Surveyor General should *transmit* to the Registers general and particular *plats* of *all* lands surveyed, and *forward* copies of said plats to the Commissioner of the General Land Office, *omitting any provision for sending any plats to the Recorder of Land Titles,* fixing the fees of the Surveyor General for recording the surveys executed by his deputies, and for certifying copies of plats of surveys in his office, and

enacting that *all* plats of surveys, in *any* office established or authorized for the purpose of executing *or recording* surveys, should be delivered to the Surveyor General.

After that, it could not be said, in any sense, that *surveys* were returned anywhere, to any officer or office, other than the Surveyor General: and under the former acts, if returning a plat to the Recorder was a return of the survey to him, so was "a like return of the plat" to the Commissioner of the General Land Office a return of the survey to *him*. The phrase "return of the survey," thus used was a loose expression incorrectly used, and misled the Court, which has supposed, even in Mackay *vs.* Easton, that the *survey* of a New Madrid claim was actually *returned* to the Recorder of Land Titles.

After the passage of the act of 1816, the surveys of private claims *could not be returned* to the Recorder of Land Titles. That act forbade it. For, by its express provisions, all surveys, public and private, made by, under, or through the authority of the Surveyor General, were to be by his deputies *returned to him* to be approved, filed, and recorded in his office. There they remained as public records, from which general and particular plats were to be had, and certified copies obtained, which copies were declared to be evidence in the United States Courts. And this retention by the Surveyor General of all surveys made by his deputies was not only in accordance with the law, but was the undeviating practice of that officer.

In case an actual survey had been made in the location of a claim, it was usual to attach to the *plat* a *copy* of the field-notes of the survey, the original being retained; because that was a convenient mode of giving the notice. But the copy was not indispensable. The law did not require it. None of the original papers ever left the Surveyor General's office. There are twenty-two of these New Madrid claims located in Arkansas, and the application, locating warrant and survey, are *all* on file *now* in each case, in the

office of the Auditor of Public Accounts of the State of Arkansas; that officer being the custodian of the records of the Surveyor General's Office since the surveys in Arkansas were completed.

And so, likewise, papers of this character were retained by the Surveyor General of Missouri; and when that office was closed, were turned over to a custodian in St. Louis, where they are now.

The Recorder never noted the time at which he received New Madrid papers from the Surveyor General, or when he passed upon them, or when, if at all, he recorded them. The papers sent to him were never filed by him, nor attached by him to the patent certificate, and delivered to the claimant for transmission to the General Land Office; and from 1815 to 1830 these papers sent by the Surveyor General to the Recorder, were never recorded by the latter. The practice of recording them commenced with Frederick R. Conway, after 1830.

All the inquiry made by the Recorder, on receiving the plat and notice, was to see whether his books showed that he had issued a certificate of allowance of claim in favor of the party for whom the location had been made; and then, whether the number of the certificate on which the location had been made, was the same as appeared by his books. These things ascertained, he granted a patent-certificate. The law required no more.

All this is positively proven, by the testimony of Frederick R. Conway. If he had testified any otherwise he could not have been credited; for in all this he simply followed the law. The attorney representing the United States objected to evidence of the *practice* in the Surveyor General's and Recorder's offices. But when misinformation, or information misunderstood, from the GeneralLand Office, has been used with such fatal effect, in more than one case, to destroy a completely good right to land, the Court will hardly refuse

to hear it, in order to correct an error, to protect a valid title, and to prevent further injustice.

The Recorder of Land Titles did not pass upon or approve the survey, for he could not undo or revise what had been done by direction of, or by, the Surveyor General. The law gave him no *power* to do it, and offered him no *means* of doing it. *He* could not know whether the land was subject to location : whether it was a sixteenth section, or included a salt spring or lead mine, or was reserved from sale, as included in a Spanish grant, or for other reasons. The Surveyor General had all the field-notes and plats of *all* claims, in whatever office or place they had been, prior to 1816. If he had not had them, his surveys would continually have interfered with French and Spanish grants, and there *would* have been a "great field of litigation."

A writer in some Review, some five or six years since, undertook to show that Congress, in regard to these New Madrid claims, had been for forty years endeavoring to avoid the decisions of the Supreme Court, and cure illegal locations. A more lamentable display of ignorance of a subject was never made, even in the pages of such a publication ; for the whole was exactly the reverse of the truth. There never was an illegal location made, except where, in a very few instances, lands were taken whereof there were incomplete and unconfirmed Spanish or French grants. No act of Congress has ever removed a *legal* objection to a location ; but every one has been enacted to overrule some erroneous decision of the Treasury Department or the Attorney General, that never could have been made if the condition of lands and claims in the Territory of Missouri had been well known. What, for example, could have been more preposterous than the decision that the Missouri Territory mentioned in the act of Congress meant only the organized counties, except the *reason* given for confining pre-emptions to those counties, to wit, that otherwise men might settle among the Blackfeet, in the Rocky Mountains, and claim pre-emption right to a

piece of land somewhere in that valuable region? That was, though not quite in that language, the exact reason given. Why should not a New Madrid claimant have located his claim on the Yellowstone or in a salt plain of the Arkansas, or in the Llano Estacado, if he preferred to own land there?

We err: there was one more absurd—the meaning attributed to the phrase "the sale of which *is* authorized by law."

The Surveyor General of Missouri and the Recorder of Land Titles made their practice conform to the law, because they understood the law, which the men at Washington did not. These able and sensible *local* officers, knowing that when the act of 1815 passed, the public surveys in Missouri had not even begun, knew, of course, that Mr. Wirt's notions were worse than nonsense, because they annulled the law. They did not assent to them, and the Surveyor General said so.

The Recorder's office is still in existence and kept in St. Louis, and there is not now and has not been since the creation of the office of Surveyor General for Illinois and Missouri in 1816, a single survey, or a paper purporting to be a survey, returned by the principal Deputy Surveyor, or by the Surveyor General either, on file in the said Recorder's office, of a New Madrid claim, Spanish grant, or other private land claim. But, on the contrary, *all* such original papers are in the Surveyor General's office. And the notices and plats, sent by the Surveyor General to the Recorder, *are not on file* in the Recorder's office, but *are* on file in the General Land Office at Washington.

In Hale *vs.* Gaines and others, (22 Howard, 144,) the Court said that the Surveyor General disregarded the application for a survey originally made, and so the claim stood from 1818 to 1838. The fact of the survey of 1820 did not appear in the case.

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and notice reached the Recorder. They might as rationally have argued that there is no purchase when land is entered by virtue of a right of pre-emption, until the Receiver's receipt for the money is filed with the Register. They enlarged upon the necessity of a re-conveyance by the locator, after that; down to which period, they said, and until the exchange of land took place, the claimant was not bound, but might abandon his proposed location, or change it for another, or sell his float, or elect to keep his injured land. The only answer necessary to all that is, that the *law* provided that when a location was made, the land should revert to the United States.

Another answer to that nonsense is, that if a re-conveyance by the party *to* the United States was necessary to effect the exchange, so was a patent *from* the United States. In an exchange of one thing for the other, each buys and sells at the same time, and the title of each must pass at the same time, or else one would at the same time own both things.

And still another is, that when a man has located a warrant or a certificate of his right to locate a donation, he may, if he will, proceed no further, and abandon his location; but it is none the less complete, if no more remains to be done by him. It gives the right to a patent none the less, because he may not choose to take it.

The Court again decided that there was no location, until the plat and notice were received and *approved* by the Recorder.

But this was to add to the law; for what it said was, "which notice and plat the said Recorder *shall* cause to be recorded in his office . . . it *shall* be the *duty* of the Recorder to transmit a report of the claims allowed and locations made . . . and *shall* deliver to the party a certificate . . . and the Recorder *shall* thereupon issue a certificate, &c., On receiving the notice and plat he had no option. He could not refuse to give his certificate entitling to a patent. If he could *approve* the plat and notice, he could *disapprove*

them: and the law gave him no such right. The action of the Surveyor General was, as to the survey, final, because the law gave no power to any one to revise or correct his action.

The Court, in that case, having only the survey of 1838 before it, as an *original* location, held that it was invalid, because of the reservation in 1832, and of its disobeying the act of 1822, in not conforming to the sectional lines required by that act in all *future* locations; and that the act of 1843 did not remedy *these* defects.

All that would be true, if the survey of 1838 had been made for the purpose of *locating* the claim. As it was not, it is foreign to *this* case.

In Rector *vs.* Ashley, 6 Wallace, 142, the court again ruled that the return of *the survey* to the office of the Recorder was essential to the appropriation of the land; that the party acquired no vested interest in the land until the *survey* had been made, and the *survey* had been filed in the office of the Recorder, and *approved* by him.

Nothing in the record of that case showed when the survey, dated May 30, 1838, was returned to the office of the Surveyor General. It is only said that it was certified on the 16th of June, 1838, to be *then on file* in the office of the Recorder of Land Titles. Nor did it appear whether there had been a survey at the time—that is, in 1820, under the application of 1819. But it is very certain that the case was far from showing that the *location* of the New Madrid claim of Cockerham was not prior to that of Ashley, even if made in 1838.

It is clear, from the use of the word "survey," that the Court supposed that the survey itself, i. e., that which in fact constituted the return and record of the survey, in the Surveyor General's office, was required to be and was, in practice, returned to the office of the Recorder of Land Titles. It might as well be said of any other notice, of an entry by purchase, of a payment, or of an award, or of any

other thing done, that it *is* the entry, payment, award or thing done, itself. To this mistake all these decisions have been owing. They had their origin in the phrase used by Mr. Justice Catron, in Bagnell *vs.* Broderick, "the plat and certificate of the Surveyor."

The case of Mackay *vs.* Easton, 19 Wallace, 619, shows that the Court still labors under the same error. In the statement of the case by the Court it is said of Easton, "upon his application such location was made. He had a survey made of the land located. He had *the survey* transmitted to the Recorder of Land Titles." Again it is said, "The Court was speaking at the time of a completed and not an initiatory location, one which would appropriate the land; and evidently considered that there could be no such appropriation, until *the survey* was returned to the Recorder of Land Titles, as had been held in several cases. . . In this case it is admitted that *the survey* was thus returned. . . In several cases it was held that there could be no effectual appropriation of the land located under a New Madrid certificate, *until the survey made by the officer of the Government* was returned to the Recorder of Land Titles." And again, speaking of the locator's right to the final certificate; "that he could not acquire until the plat of the survey was returned to the Recorder of Land Titles. Until the plat was placed *in the public depository in the Territory*, of evidences of title issuing from the United States, there was no official recognition of the proceedings taken by the claimant, which bound the Government."

Now, by the act of 29th April, 1816, the Surveyor General, by whom *all* surveys were to be made, and in his office are to be recorded, and all plats in *any* office elsewhere to be sent there, was required to send copies of *all* plats, not only to the Registers, but to the Commissioner of the General Land Office. That proves that they were not subjected to revision by the Register or the Recorder; and the approval of the surveys and transmission of the plats by the Surveyor

General was "an official recognition of the proceedings taken by the claimant." It was official evidence that his actual location was *made* and completed; the official notification *thereof*, given, not only to the Recorder, but also, direct to the General Land Office. The whole business of *location* was done in the office and under the direction of the Surveyor General. The application, commonly termed the *location*, was made to him, and remained in his office. No law or regulation or construction required him to send it anywhere. Only he, therefore, *could* determine whether the survey had been made in accordance with this application.

Moreover, the Recorder did not give the certificate that was to be filed with him within twelve months, and no one else *could* give it, but the Surveyor General; and it was by it certified that the locator was entitled to a patent. Read by the light of the law of March 3d, 1807, there is *no* doubt at all of the real reading and meaning of the act of 1815; and with it, that apparent necessity which compelled the former decisions of the Court, so contrary to the principles settled by itself, upon the general subject of locations by survey, at once disappears.

Can the Court read the act of 1815 by the light of the act of 1807? If it cannot, the later act is arrant nonsense, and contrary to all precedent, in requiring two certificates, for no purpose that can be conceived of, to be given by the same officer, in *immediate* succession, if the party chose, the first made out, delivered and returned, and the second given, all without the locator's going from the Recorder's presence, or even needing to take the first into his hand.

Si de interpretatione, Callistratus said, (Dig. 1, 3, 37) legis quæratur, imprimis inspiciendum est, quo jure civitas retrò in ejusmodi casibus usa fuisset; and certainly it was never heard before that so useless a farce was required to be gone through with, by any law in regard to the public lands or claims to land, as that a certificate utterly useless to the party should be given only that he should hold it for a mo-

ment or a year and then file it with the officer who issued it, to receive another not substantially different.

Two great maxims of the law are, those of Celsus (Dig. 1, 3, 18,) Benignius leges interpretandæ sunt, quò voluntas corum conservatur; and (Dig. 1, 3, 19,) In ambiguâ voce legis, ea potiùs accipienda est significatio, quæ vitio caret: præsertim cùm etiam voluntas legis ex hoc colligi potest.

Certainly that meaning of this law which frees it from a vicious absurdity is that which the act of 1807 shows to be plainly the true intention; and this, it is also certain, can be collected from the very language of the law itself. There has been simply a dislocation of the sentences by some clerical misprision; and surely, non res sermoni subjicitur, if there are certain means by which the Court, restoring the true reading, can give effect to the legislative will.

The Court, for want of this simple explanation, was constrained to distinguish, in Mackay *vs.* Easton, between the *actual* location of a New Madrid certificate, by survey made by the Surveyor General or under his direction, as "the location heretofore made," remedied by the first section of the act of 1822, whereby fractions of the public lands were created and sold; and the *perfected* or completed location by return of the survey to the Recorder of Land Titles. With the explanation, it is no longer necessary, in order to prevent injustice and absurd consequences, to make this artificial distinction, so obviously false in principle and mischievous as an unwise innovation, contrary to the well settled law, that an actual location by a completed survey, of a warrant or grant, *is* an appropriation of the land.

At the risk of somewhat of repetition, and hoping to leave no doubt in the mind of any member of the Court, we respectfully say by way of summary, in regard to these decisions, that we believe it demonstrable:

1st. That there was a complete location of this claim, be-

fore it became the duty of the Surveyor General to inform the Recorder, by plat and notice of the location, that it had been made ; and that the decisions believed to hold the contrary, only seem to do so, because of misinformation and error undetected.

2d. That if these decisions do indeed settle it as law, that there was no location, until plat and notice returned by the Surveyor General to the Recorder, the United States cannot profit by that objection, because their officers, by erroneous instructions, prevented the return or transmission of such plat and notice.

It never was true, either in point of fact or practice, that not only a survey and a return of it to the office of the Surveyor General, but *also* a return of that survey by the Surveyor General to the Recorder of Land Titles, was necessary to constitute a location of a New Madrid claim. There is no knowing what "practices" would have grown up in Missouri, if the Departmental and Bureau law-makers had had their uncontrolled way about it. Their decisions simply annulled the New Madrid Act; for they distinctly were that there never was a foot of land in the Territory of Missouri, on which a New Madrid claim could be located; and there never could have been a valid location, if no adjutory act of Congress had overruled their decisions.

The act of 1815 did not require the Deputy Surveyor, (who *made* the survey,) to return the *survey* or *plat* to the Recorder of Land Titles. It required the Principal Deputy Surveyor, the *Chief* of surveys, in Missouri, to do what was to be done. *after* return of the survey.

The "*location*" was to be made by *him*, by causing the survey to be made; and it was made his *duty*, AFTER THE LOCATION, to return "*a plat of each location made*" to the Recorder, with a *notice* in writing, designating the tract that *had* thus *been located*. That is the language of the act, and it is not possible to mistake its meaning.

The Recorder had nothing at all to do with making the

location, even under the act of 1815, before the passage of that of 1816. He gave the claimant the evidence of his right to have and to *locate* other lands, and then he could do no more until the party *had* located his claim. When evidence was produced to prove that such location *had been made*, by the notice of the Principal Deputy Surveyor accompanying a plat, he was authorized to grant a patent-certificate—a certificate, that is, that the location had been made by the Principal Deputy Surveyor, at the instance of the party.

The act of 1816 made no change as to that. But before its passage, the Recorder was required to record the plat and notice. As none were recorded by him until after 1830, we must conclude that none came to him until after the passage of the act of 1816. In fact, Schedule or Exhibit F, shows that none did. After the passage of the act of 1816, he had to send all plats and surveys in his office to the Surveyor General, and all made on surveys executed afterwards went to the same office, and were files if not records of the Surveyor General's office, and he alone could certify copies of them.

Thus the surveys and plats *never* were returned by the Deputy Surveyors to the Recorder of Land Titles, but at first to the Principal Deputy Surveyor, and afterwards to the Surveyor General. And he had, of course, to pass upon the surveys and approve and accept or reject them ; and he did not and could not transmit a plat, and notice that location had been made according to the plat, until he had accepted and approved the survey, and until, thereby, the location was complete and indefeasible.

We do not say that the *application* for a survey was a location, within the meaning of the law, where a survey was necessary to sever the land selected from the public domain. Such an application, not followed by a survey, would have been ineffectual to identify the land or carve it out of the public domain. But, when the survey was *actually* made on

the ground, the lines run and marked, the corners established by posts and made certain by bearings from natural objects, and the plat was made out and the field-notes appended, and the whole signed by the Deputy Surveyor, and returned into and filed in the office of the Surveyor General, the survey was complete, and the location was therefore complete, all having *relation* to the date of the application.

No time was prescribed, within which the Surveyor General was to return the copy of plat and the *notice* to the Recorder. The party had a right to his certificate at once—to be given by the Surveyor General, and to show that the location had been made—and that he was, *therefore*, entitled to his patent-certificate. This was *his* muniment of title; and to put the Recorder officially in possession of the evidence of the location, the Surveyor General was required, within some reasonable time, of course, to forward to him a copy of the plat and a notice designating the tract.

The various Recorders, it is proven, kept no record of the times when the plats and notices reached their office; and therefore, if these were the locations, it would be utterly impossible, in most of the cases, to ascertain the actual date of the location.

When a quarter, half, or whole section, according to the lines of the *public* surveys, was selected, it was only necessary to send a plat of that portion of the public survey. There the location was complete as soon as the application was made. The Recorder had nothing to do with the public surveys. How could he have anything more to act on, with regard to a *completed* particular survey?

As soon as the survey was returned to the Surveyor General's office, he could give and certify copies of it, to be evidence in all courts. Hammond and Rector could have demanded that, *if the Surveyor General had never sent a plat and notice to the Recorder of Land Titles at all*, but for the instructions from the General Land Office, which prevented the recognition and recording of the survey, as a location.

The act of 1815 *defines* the meaning of a *location* of a New Madrid claim. No construction can change it. To do that is to *make* law. It was the application for and obtaining a survey. As soon as the survey was made and returned to the office of the Principal Deputy, or, after the change in that respect, of the Surveyor General, all that the *party* had to do was done. The rest were duties of officers of the Government.

The return required to be made by the Principal Deputy to the Recorder was but the *evidence* of the location. If lost *in transitu* and its loss unknown, so that it was never recorded, the location would have been none the less *made* and *complete;* and it could unquestionably have been proven at any time afterward, even by an unofficial copy, or by the Surveyor's marks upon the land, and oral evidence.

Such was the practice; and it was in conformity to the law.

What was there in the act of 1815, or in the nature of a right to locate a New Madrid warrant, to change the settled law in regard to the location by survey of lands, as universally held in cases of warrant and survey? We can see nothing in that provision of it which made it the duty of the Surveyor General to return or transmit a plat "of the location" and notice designating "the tract thus located," to the Recorder of Land Titles. It was his duty, also, to send a plat to the General Land Office. If the performance of one of these duties was essential to complete the location, why was not that of the other?

What was the settled law, then, in like cases?

In the case of a French or Spanish grant, nobody ever doubted that the survey was a complete *location*, though to obtain confirmation the party had to give notice of his claim and file his plat of survey and other papers with the Recorder of Land Titles.

In Stringer *vs.* Young's Lessee, 3 Peters, 320, the law of Virginia required a surveyor to return every survey within three months after it was made. But, the Court said, it did not declare that the validity of the survey should in any degree depend on its being recorded. The validity of the survey is not affected by such failure.

In that case, the survey did not appear to have been recorded at all.

In Smith *vs.* The United States, 10 Peters, 333, a case of a Spanish grant of so many acres to be located at pleasure, the Court said, that the party could have no right of property in any particular land until some act had been done, *by which the grant acquired such locality as to attach to a particular spot.* A grant for so much land, generally, the Court said, must be "*located by a survey*, made by a proper officer." The grant was an authority to the public surveyor, *or his deputy*, to make the survey.

The true dividing line between the executive and judicial power is laid down in West *vs.* Cochran, 17 Howard, 413, and again in Kissell *vs.* St. Louis Public Schools, 18 id., 25, thus:

"Until a designation, accompanied by a survey or description, was made by the Surveyor General, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

West *vs.* Cochran was the case of a Spanish grant. The seventh section of the act of 1807 required that all tracts confirmed by the Board of Commissioners, that had not previously been surveyed, should be surveyed under the direction of the Surveyor General; and that he should transmit general and particular plats of the tracts thus surveyed to the proper Register or Recorder, and also transmit copies to the Secretary of the Treasury, and, on the certificate and plat being filed with the Register or Recorder, he was to issue patent certificates.

This is exactly the process subsequently prescribed as to

New Madrid locations; but nobody ever imagined that the location was not complete until the plat and certificate might be filed with the Recorder; or that *he* was to *examine*, *pass upon*, and *approve* the survey.

The Court, in both these cases, regarded the *survey* as completing the right to a patent; and if the decisions of the *State* courts of Virginia, Kentucky, and Pennsylvania are referred to, it will be found that nothing *can* be better settled than that, as the Supreme Court of the United States always held, except as to New Madrid claims, the *survey* itself, regularly made and returned, severed and carved out the land from the public domain and was the location.

Under an agreement with the State of Michigan, that section No. 16, in every township, *should be granted* to the inhabitants of the township, for the use of schools, the Court said, in Cooper *vs.* Roberts, 18 Howard, 179, that "until the survey of the township and designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem* becomes, by the performance of that executive act, a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

In Cousin *vs.* Blanc's Executor, 18 Howard, 210, the Court said, "Cousin's title (a confirmation with order for location and survey, made by the Register and Recorder,) had no standing in a court of justice until the land was surveyed, and the survey approved as a proper one at the Surveyor General's Office. * * The mere loose *order* of survey * * cannot be recognized in this case as conveying any vested interest."

So in Bryan *vs.* Forsyth, 19 Howard, 334, the Court held, that, in cases of confirmed Spanish claims, an action of ejectment could be maintained when a survey had been duly made and approved and recorded in the Surveyor General's Office: that when the surveys were made, and plats returned, and approved and recorded by the Surveyor General, and recognized as valid at the General Land Office, it bound the parties to it, the confirmee and the United States.

In Lessee of Lewis *vs.* Meredith, 3 Wash. C. C., 84, on the subject of warrants and surveys in Pennsylvania, the Court said that, if a person applying for land specified with sufficient certainty the land he meant to appropriate, the appropriation was called a *special* one, and the warrant a special warrant. That amounted to a location immediately; and that would have been, under general law and in very fact, the case with the application of Rector and Hammond, but for the statute's defining a location to mean a survey. For their application so specified the tract selected as to fix and define it with sufficient certainty.

But where the warrant gave a right to only a certain *quantity* of land, to be fixed and located at a future day, by a survey, that was called a *general* warrant; and under these there was a location "*when the survey was made and returned.*"

And in Dubois *vs.* Newman, 4 Wash. C. C., 77, the Court said, "To complete the legal title, the plaintiff must show a legal *survey*. He must produce the survey regularly made, or, at least, he must prove, by parol evidence or otherwise, that a survey of the land in dispute was actually made, for the holder of the warrant." It had before said, "A general or indescriptive warrant amounts to a location, *when it is surveyed*, and not before."

The act of 1816 repeals everything before enacted repugnant to or inconsistent with its provisions.

The act of 1815 required New Madrid surveys to be recorded in the Recorder's office. The act of 1816 required

the Surveyor to record them in *his* office. The act of 1815, in this, was repugnant to, and inconsistent with, that of 1816. So much of the former, then, was by the latter *repealed*. So, also, the act of 1815, required the Surveyor to return a "notice and plat" to the Recorder; but the act of 1816 directed him to make out *general* and *particular* plats of all lands surveyed, and send them to the Registers and Receivers, and to the Commissioner of the General Land Office. In this again, in spirit and substance and by *implication*, the latter repealed and modified the former act.

Of course the application, though the law and the Schedule or Exhibit F calls it the *location*, was not it, but the location was complete only when a survey was made, according to the application, and returned to the proper office.

But then there is another principle that steps in, which the court has never noticed in these cases: which is, that when these subsequent and necessary acts are done, the whole relates to the day of application. As Mr. Cruise says, "There is no rule better founded in law, reason, and evidence, than this—that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as *one act*, and operate from the substantial part, by relation." We need not multiply authorities on this familiar doctrine. It is enough to refer to Jackson *vs.* McMichael, 3 Cowen, 75; Caroley *vs.* Wallace, 12 Missouri, 145; Lands *vs.* Brant, 10 Howard, 373.

It was, therefore, perfectly in conformity with law to direct a survey *after* the time fixed for *locating* such claims had expired, where the *application* had been made in time. Patents issued, accordingly, upon such surveys, as is shown by the official documents in this case, in large numbers.

That is only what was always held in all the Virginia and Kentucky cases of lands claimed by warrant and survey. It is the simplest possible application of the doctrine of relation, which always applies in every such case. The survey *gives effect* to the selection; it is the realization of it, and, but

for the effect of relation, a later selection, with a survey sooner made, would have taken the land from the earlier applicant because the Surveyor chose to delay his survey.

As to the survey made in 1838, on the order of the Surveyor General, and in obedience to standing instructions, it was a re-survey, because there had been an original survey. The object of making it was to have the lines of an existing location ascertained, in order to close the public surveys on them. If the lines had even become effaced, so that they could not be retraced, (as was supposed to be the fact,) it would have been but a re-survey; and that is what it was meant to be. Supposing the marks no longer to exist, the Surveyor General recurred to the application and directed a resurvey *strictly* in accordance with that. Upon his hypothesis, he could in no other way have the location resurveyed, even with the aid of the old plat. If the marks were gone, and the bearing-trees cut down, and the posts rotted or burned, the description in the application, and the plat were the only guides.

This resurvey, of course, *related* to the original application; and if the old lines could not be run again, it might be so resurveyed, to-day, by the calls of the application. Rector thought so, and that he had a right to accept this resurvey; but no man knows *all* the law; and he did *not* know that it was necessary for him to show, at the same time, the evidence of the survey of 1820. He does not lose his title by that, any more than he would have lost it if the old lines had been wholly effaced, as he, also, thought they were.

Moreover, his counsel thought that as the survey, even if not a *re*-survey, but made upon his application filed in 1819, would, *whenever* made, *relate* to the date of that application, the reservation act of 1832, intervening, no more prevented its being made in 1838, nor its *relating* when made, than an intervening right in a third person would. And notwithstanding decisions to the contrary, the counsel thinks so yet, with even a greater confidence than before.

Now, in relation to the notion of an *exchange* of land by the New Madrid claimant and the Government, we repeat, 1st, that there was none contemplated. An *exchange* of lands is effected by *contract*. Exchange, *Permutatio*, is a *contract*, by which one of the contracting parties binds himself to give a thing to another, in the place immediately of another thing, which the other contracting party binds himself on his part to give *him*.

The contract of exchange resembles the contract of sale.

In the early ages of the world it took the place of that contract. Wherefore the Sabinians held that it was a genuine contract of sale. (L. 1, ff, de contrah. empt. Dig. 18, 1.) The Proculeians held that it differed from a contract of sale, because each of the things is both the thing and the price, and each party both buyer and seller. (L., 1, § 1, ff, de contrah. empt., Dig. 18, 1.)

At all events, it *resembles* the contract of sale, and is of its nature. Permutationem vicem emptionis obtinere non est juris incogniti. L. 2, Code, de rer. permut. Permutatio vicina est emptioni. L. 2, ff, de rer. permut. Dig. 19, 4.

Each party warrants against eviction and incumbrances. Pothier, Traité du contrat de Vente, Part III., Article V., Nos. 618, 620, 621, 623.

Certainly it must seem, on reflection, a grave error to have spoken judicially of an *exchange* of lands, as contemplated by the New Madrid act; because it is not allowable, in judicial decisions, to use words in any other than their legal meaning, lest injustice and judicial wrong-doing should be the consequence; aad it is quite certain that, in the legal meaning of the word, no *exchange* was contemplated by the law.

But, 2d, the United States *has* taken, more than fifty years ago, a formal relinquishment of title from Langlois. He sold his injured land to Story, and Story conveyed it to the Government. In Rector *vs.* Ashley, no relinquishment appeared, and this was relied on by Ashley's counsel, in argu-

ment, as a ground for holding the location and claim invalid. The Court, upon its own premises, would necessarily hold so, if it were shown that the party still owned the injured land. It did so hold in one case, when the owner of the land proved that he had never sold or located or made any claim, and that he knew nothing about it for many years.

Now, in every such transaction, there must be mutuality. The Court declares that, if the claimant has not relinquished his land, he cannot have the land selected in lieu of it. The converse of the proposition must be equally true. If he *has* given up his land, if the United States has taken it, and had it for fifty years, or sold it, it cannot refuse to confirm to him the land selected in its stead, if it was *public* land when he selected it, and its sale not forbidden; for, if not *forbidden*, it was *authorized*, by law. All the public land is divided, and always has been, into those two classes. When the Government takes title, it must give title. An exchange is where one thing is *immediately* given for another. The two conveyances, the Court has said, must be *concurrent*. On that ground it has *destroyed* New Madrid locations. It was a hard and harsh decision; but if, as is said in Lessieur *vs.* Price, "a concurrent vestiture" of title must occur, the injured land *must* have vested in the United States *at the time* that title was taken by the new location; and if there is no location *until* the United States takes title, then, on the other hand, by the same stern and inflexible rule, the United States could not, by unfounded objections, *defeat* the location, and at the same time *retain* the injured land. They have had that of Langlois, for which Rector and Hammond paid six hundred and forty dollars, (Rector, in fact, six hundred for half of it,) fifty years. Are we not entitled to *demand* the land selected by way of "exchange?"

The act of the officer is the act of the Government. How can his erroneous decisions *preventing* the doing of the very thing which the Court deems indispensable, give the Government a right to rely on the party's *failure* to do those

things, as a ground for a right to hold *both* the injured land and the land selected in *exchange* for it? Can the Government, then, rely on its own act of 1832, *reserving* the latter from sale, entry or location, as the muniment of its title to retain it? On the doctrine of the Court itself, the title of Rector to the land is incontrovertible.

Nothing in the cases of Bagnell *vs.* Broderick and Barry *vs.* Gamble conflicts with the sound principle we have quoted from Lytle and others *vs.* The United States. The uniform *professions*, if not always the practice, of the General Land Office, have always been in accordance with this just and salutary principle. And, the case in which the Commissioner of the General Land Office stated it, in 1836, cited above, was, that the claimant applied, a few days before the act of 1834 expired, to prove up his pre-emption and enter the land; but there was a vacancy in the office not filled until after the act had expired, which prevented him; after which, he filed his proof, and attempted to enter the tract, was refused permission, and appealed to the General Land Office. That office instructed the Register and Receiver to allow the claim if they were satisfied it came within the act; and the Secretary of the Treasury, the Hon. Levi Woodbury, approved the decision. Instr. & Opin., 539.

In the present case, in consequence of the decisions of the Secretary of the Treasury and Attorney General, the owners of the Langlois claim could do nothing, after their location of the claim, by selection of the land including the Hot Springs, and by survey of it made and returned to the office of the Surveyor General. The obstacle was illegally interposed. After the act of 1832 passed, at any rate, *the single objection that remained*, and which did not disappear until August, 1854, was that the Quapaw title had not been extinguished on the 17th of February, 1815; and that objection created an obstacle which absolutely prevented the recording of the survey and its transmission to the Recorder of Land Ttitles.

It is true that this Court had endeavored to explode it long before.

In Stoddard *vs.* Chambers, 2 Howard, 318, it had said, and it repeated the same words in Easton *vs.* Salisbury, 3 Howard, 431:

"The location of Chambers was made on land not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. *Had the entry been made, or the patent issued*, after the 26th of May, 1829, when the reservation ceased, and before it was reserved by the act of 1832, the title of the defendant could not be contested."

And in the latter case, the court took pains to show that these words were meant to be taken in their fullest sense, and as a declaration, that if the sale of the lands had been authorized, i. e., *if they had not been expressly reserved from sale, as it was held they were*, at the time of the *location*, that location would have been valid. In the same case they said: "A holder of a New Madrid certificate *had a right to locate it on any of the public lands which had been authorized to be sold*, * * * The President of the United States has no right to issue patents for land, the sale of which is not authorized by law."

It is true that the Court has never been able to determine the meaning of the phrase, as applied to the public lands—"the sale of which is (or may be) authorized by law." It has always inclined to give it too narrow a meaning. We will inquire as to that hereafter.

In Barry *vs.* Gamble, 3 Howard, 32, the notice of location was filed on the 7th of July, 1817, with the Surveyor General. The land was surveyed by authority of the United States (as part of the public surveys) in the fall of 1817, but the survey was not closed until the spring of 1818.

In April, 1818, the New Madrid claim was located by a Deputy Surveyor, in a square form, disregarding the cardinal points, and calling for the lines of other tracts as boun-

daries. Sale of the adjoining lands was not directed by the President until June 13, 1823, and the surveys were not returned to the General Land Office until some time in 1820. Patent issued on the New Madrid location in 1827.

The opinions of Messrs. Wirt and Butler were relied on, to prove that the land was not public land, the sale whereof was authorized by law; it being covered by a Spanish claim, and the act of February 15, 1811, not authorizing the President to sell lands so situated.

The counsel stated that, in 1817, there was no law in force for the sale of land in the St. Louis District; nor was there then in existence, either a St. Louis Land District or a St. Louis Land Office, or any public survey made according to law.

The Court said, speaking of the objection that until the land had been *offered* for sale, under proclamation of the President, no valid location of a New Madrid claimant could be made on it, that, "It could not have been intended by Congress that the sufferer should surrender his injured land, get his warrant from the Recorder, and then be compelled to wait until after the public sale, which might sweep all the lands, out of which he could obtain a new home."

The unfounded objection of disregard of the lines of the public surveys, in making this location, was put out of the way by the act of 1822, but the question remained whether it was made on lands the sale of which was authorized by law.

The Court held that the act of 1822 had cured but that one single defect; and that the New Madrid sufferers were preferred claimants, having, like others who had a legal preference, a right to buy, so soon as the officers of the Government had a right to sell, and sales could be made founded on public surveys.

But here was another error. The law did not contemplate locations according to the public surveys. *There were none in Missouri, in* 1815. It was "*contemplated*" that each

claimant was to have his land specially and particularly surveyed, in any shape or figure he might choose; and all the objections made by the authorities at Washington were simply endeavors to thwart the purposes of the law; which, curiously enough, seems *always* and instinctively to be the first object, whenever the law to be impeded is a *beneficial* one.

The Court broadly held that Lafleur's New Madrid location, though located on unsurveyed lands, *was* rendered valid by the act of 1822; saying that so it was decided, in fact, in Stoddard *vs.* Chambers. And this, although Mr. Justice McKinley showed that the section lines had not been run when the location was made; and although he and Justices Story and Wayne insisted that the sale of the land was not authorized by law when the act of 1822 was passed, nor until 1823.

But, notwithstanding these explicit decisions, settling at least that one miserable technicality, the Department of the Interior adhered to it until 1854. It died hard. It is a curious feature of the idiosyncrasy of the administration of the public lands, that as soon as a law passes for the benefit of those equitably entitled to lands, every resource of ingenuity is availed of to find some mode of rendering the law useless and impotent. The General Land Office is always in arms against even pre-emption claims, and has succeeded in defeating a multitude of them. Every claim even of a right to *buy* land at the Government's own price is deemed to be, *primâ facie*, an attempt to *wrong* the Government, and almost a personal wrong to the Bureau itself, especially if a railroad corporation wants the same land by way of gift. And the devices unconsciously resorted to under the stress of this prejudice would be provocative of amusement, if they were not the cause of vast wrong and injustice. Look at the act of March 1st, 1843. It undertook to make valid all the New Madrid locations, pre-emptions under the act of 1814, and Cherokee pre-emptions, in Arkansas, south of

the Arkansas river. *The Department of the Interior and General Land Office have prevented its validating a single one of either.* And all the previous laws of 1821, and the others, were to a great extent paralyzed in the same way. The case of Cunningham *vs.* Ashley, in which the Supreme Court brushed away a whole network of official cobwebbery, affords a fair specimen of the persistent endeavors of the Office and Department to defeat, if possible, and when that cannot be done, to delay, the confirmation of claims. This case of Rector is a still more striking one; for it is a case in which title has been denied for more than half a century, on a perfectly valid location, to which there never was a valid objection from the beginning; upon mere quibbles and error as to the meaning and intention of the law, and of that condition of things which was the law's real and best interpreter, and of which those who administered the General Land Office should have been better informed than any men.

Of course the Government cannot now object to this claim, that the survey was not recorded, and that it was not returned to the Recorder of Land Titles; for its officers, whose acts are the acts of the Government, having the whole weight of authority of the Executive Department, had, by an objection that had no validity, and which the Government has long since, by its officers, acknowledged to have been wrongfully interposed, prevented the performance of these very official acts which the law made it the duty of these officers to do.

The Government has no such prerogative. There are equitable estoppels against it, as well as against individuals; and the Court will not permit itself to believe, unless it is forced to the belief by a resistless necessity, that the nation has authorized its Law Officers to resort in its behalf to iniquitous defences, or empowered them to endeavor to defeat its grants and beneficences by strict construction or the ingenuities of cavillation. The Roman Prætors under the Emperors settled all that, long ago.

So long as the Government persisted in its objection, the owners of this claim could not lose their rights. Having asked for and obtained the survey and its return, they could rightfully and safely wait until the Government should remove the impediment, as it had already removed others that were as little substantial.

Of their vested right to a patent they might be denuded by neglect or abandonment. But so long as the Government interposed an obstacle that had no validity and no lawful existence, and so prevented the recording of the survey, or its approval by the Surveyor General, and transmission of copy of the plat, with notice, to the Recorder of Land Titles, just so long there could be no neglect on the part of the claimants. The Government cannot take advantage of her own wrong, which the illegal decisions of her officials are. Certain principles of law and morality apply alike to governments and men. No one can prevent another from doing an act, and then have advantage from his failure to do it.

The law, in many cases, says without qualification, that a tender is indispensable. But the Courts, like the Prætors, say that if the party to whom the tender should be made, prevents its being made, or informs the party who should make it that he need not do it, because it will not be accepted, the failure to make the tender is excused. No one, government or individual, can say to another, "I told you beforehand that you need not offer the money, for that if you did I would not receive it;" and at the same time say, "You shall lose your right and have no title, because you failed to make a tender."

In Taylor *vs.* Brown, 5 Cranch, 234; Craig *vs.* Radford, 3 Wheaton, 594; and Stringer *vs.* Young, 3 Peters, 320, it was decided that the titles to lands in Virginia were not invalidated by the omission of the surveyor to record the survey; that provision of the act being merely directory. So are the provisions of the New Madrid act in regard to the transmission of the plat and notice by the Surveyor General

to the Recorder of Land Titles, and the recording of the same by him. The act expressly declares that it shall be the duty of these officers, respectively, to do these acts, and imposes no duty whatever on the claimant in regard to them.

Could a claim be any more invalidated, if, instead of *neglecting* to transmit the plat and notice, or to record the survey, the Surveyor General was forbidden to do it by his superiors, by the interposition of an unlawful and invalid objection which required him to treat the survey as illegal and void?

The *right to locate* two hundred arpents of land somewhere, and *the location in fact*, by actual survey made by direction of the Surveyor General, by a sworn Deputy Surveyor, are proven. Not a fact is wanting. The case is absolutely perfect.

Part III.

THE SEVERAL OBJECTIONS TO THE NEW MADRID LOCATION.

We aver and propose to demonstrate, that there never was a valid objection, from the very beginning, to this location.

And in considering the questions presented by the various objections that have been at different times made to its validity, we propose to go back sixty years, to the time, a little more than ten years after the United States had acquired Louisiana, when the Congress of the United States told François Langlois that, in view of two hundred arpents of land that had been conceded to him before the cession, and confirmed by the Commissioners of the New Government, and of injury to it by earthquake, he might go anywhere in the Territory of Missouri and locate, by having it surveyed, a tract of two hundred arpents, on any land which the general land law might authorize to be sold.

The present value of the property so located by and surveyed for his assignees, five years afterwards, has nothing to do with this inquiry. Any influence that that value might have would be as illegitimate as the influence of a bribe. To the Court it is precisely the same thing whether what is claimed is worth the revenue of a realm, or worth no more than the barest hill-top in a waste land.

In 1812, St. Louis consisted of two long streets running parallel with the Mississippi, with a variety of others intersecting them at right angles. It contained about one hundred and eighty houses, and the best of them were built of stone. A small sloping hill extended along the rear of the town, on the summit of which was a garrison, and behind it an extensive prairie which afforded plenty of hay, as also pasture for the cattle and horses of the inhabitants. Stoddard thought that from the want of timber to fence it, this prairie would probably remain uncultivated. Such was the capital of Upper Louisiana, founded in 1764, by Pierre Laclede, Maxan & Company.

What is now the State of Arkansas was then part of the Missouri Territory, hardly settled at all, except on the Mississippi and on the lower parts of the Arkansas, Ouachita and Red Rivers. Dr. Hunter and Dr. Dunbar had explored the Ouachita region, and given descriptions of the country and of the Hot Springs. In 1812 the water was "supposed to contain some medicical virtues," and on that account the Springs began "to be visited by valetudinarians."

It was not supposed that the extensive swamps on the west side of the river Mississippi, between the mouth of Red River and that of the Arkansas, and embracing near 8,000 square miles would always remain entirely useless. "Of the immense country between these low grounds and the rivers to the westward of them, and between the Ouachita and the Arkansas, no correct information was ever obtained." It was partly explored by the French in the early part of the last century; but no record of their discoveries, says

Stoddard, at least of any merit, has been handed down to us. Some hunters, however, had occasionally penetrated it, and they represented it as mostly destitute of wood, except along the water-courses, and somewhat mountainous. There were few settlements in 1812, in this tract; but planters began to turn their attention to it.

Forty-five miles from the Mississippi was a village on the river Arkansas, called the Post of Arkansas. The French had built a fort and formed some settlements there, in 1685, and had afterwards intermarried with the Arkansas Indians, then a powerful tribe. In 1812 these were reduced to very few in number, nearly extinguished by the Chickasaws and rum. They lived in two small villages above that of the whites, (which contained thirty or forty houses only). These Indians were afterwards known as Quapaws, the Kapas, a band of the Ouasachis or Osages having come from the north long before, and united with the Arkansas.

It is very doubtful whether these Indians pretended to claim the Hot Springs country; and there were no Indians in villages between the Arkansas and Red Rivers. But the Springs were known among the Indians, even east of the Mississippi; for, in 1857 Atus Micco or Roley MacIntosh, Chief of the Creeks, told me that he went there from the old Creek country, in 1809, to hunt.

Eight years after Stoddard published his sketches, Hammond and Rector bought the right of Langlois to locate two hundred arpents of land, and applied to locate the Hot Springs. They were worth nothing then, lying in a very narrow valley, with hardly an acre of land round them that could be cultivated. They were little visited, even in 1836, and the few visitors boarded in the log-cabins of one or two temporary residents.

As we have said, no one in 1815 owned any land in the Missouri Territory, except by French and Spanish grants, or by virtue of their habitancy and cultivation before the cession, which the United States had recognized as entitling

each to the tract so inhabited and cultivated, not to contain more in quantity than one mile square, with such further allowance for his wife and family, as the Spanish laws provided for.

Act of March 2, 1805, 2 Stat., 326.

By act of April 21, 1806, (2 Stat., 391) the phrase one mile square was exchanged for "not exceeding six hundred and forty acres." By act of March 3d, 1807, persons who had had possession for ten years of tracts not exceeding two thousand acres, were confirmed in their titles to the same, no claim to a lead mine or salt spring being confirmed thereby. Others, in possession on the 20th of December, 1803, were to be confirmed in their titles to not more than one league square, not including a lead mine or salt spring.

2 Stat., 440, 441.

Not only had the United States *sold* no lands in the Missouri Territory, in 1815, but none had been surveyed, nor even directed to be surveyed, upon the general system. The whole country, except so far as the French and Spanish claims held the land, was in one and the same condition, and open for location, provided such location did not take in a lead mine or a salt spring. There was really no Indian title to any of it. The United States never did recognize any title in the Caddos, and the title of the Quapaws to anything beyond the banks of the lower Arkansas, was merely imginary.

Six objections to such locations as that of Hammond and Rector have originated in the Treasury Department or Office of the Attorney General and been insisted on by the General Land Office. They were as follows:

1st. That locations of New Madrid claims could be made only upon lands that had been directed to be surveyed, for the purpose of being offered for sale at St. Louis;—the act of

1811 directing that the lands *so surveyed* should be offered for sale.

2d. That the Territory of Missouri, within the meaning of the pre-emption act of 1814, was the Territory as organized into counties; and that, when the New Madrid Act passed, no part of that Territory south of the River Arkansas had been organized into counties.

3d. That such locations were invalid, because made in a square, and before any public survey of the neighboring lands;—the law of 1815 requiring all locations to conform to the lines of the public surveys.

4th. That lands which the President had not directed to be prepared for sale, were not lands, the sale of which was authorized by law.

5th. That the sale of the lands located was not authorized by law at the time of the location, because they had not been surveyed, in due course of the public surveys.

6th. That the location of a New Madrid claim could only be made on lands, the sale of which was authorized by law on the 17th day of February, 1815, when the New Madrid Act was passed, and that the sale of the lands south of the River Arkansas was not authorized by law while the Quapaw title remained unextinguished, as it did until August 14, 1818.

And, 7th, it has also been held, and is still contended, that the reservation contained in the act of 1832 was not set aside or recalled or rendered no longer applicable to the Langlois location by the act of March 1, 1843; because the latter was general and the former special; and because the latter only proposed to cure the single defect of the non-extinguishment of the Quapaw title, at the time of the passage of the New Madrid Act.

We will consider these propositions and objections in the order in which we have stated them.

1st and 4th. These were one and the same objection, the attempt to limit the location of New Madrid claims to the

lands that were to be sold at St. Louis resting on the fact that these were the only lands that had been directed by the President to be surveyed.

The one question, therefore, was, whether the sale of lands was "authorized by law" as soon as a law was enacted providing for their survey and sale at such future times as the President should be pleased to designate; or whether it was not so, until he had actually directed the survey.

The New Madrid Act gave the right of location in very general terms, "on any of the public lands of the said Territory, the sale of which is authorized by law;" lead mines and salt springs being excepted.

The State of Louisiana was admitted into the Union on the 8th of April, 1812; and on the 4th of June, 1812, the residue of the district of Louisiana, (which consisted of all the country ceded by France on the 30th of April, 1803, except the portion included in the Territory of Orleans), became the Territory of Missouri, (3 Stat., 645;) and on the 2d of March, 1819, all that part of the Territory of Missouri lying south of a defined line, was erected into a separate Territory called Arkansas Territory, the act to take effect on the 4th of July, 1819. (3 Stat., 493.)

The statute creating the Territory of Missouri, provided that the Territory theretofore called Louisiana, should thereafter be called Missouri. By section 7, the Governor was empowered to lay off into counties, for the election of representatives, the parts of said Territory to which the Indian title had been extinguished.

The district of Louisiana was created by the act erecting Louisiana into two territories, and providing for the temporary government thereof, (2 Stat., 277,) passed on the 26th of March, 1804. By it, all the country ceded by France to the United States, under the name of Louisiana, which lay south of the Mississippi Territory and of a line on the west of the River Mississippi, commencing on that river at the

33d degree of north latitude, was constituted the Territory of Orleans: and, by section 19, the residue of the Province of Louisiana, ceded to the United States, was made the District of Louisiana.

Any of the lands within the limits of this wide Territory, except those in which there were lead mines or salt springs, or to which there was claim of title under French or Spanish grant, or right of pre-emption under the act of 1814, were open to be located by New Madrid claims, *if their sale was authorized by law*. Whether that expression meant authorized when the New Madrid Act passed, or whenever the location might be made, we will inquire hereafter. Here we are to endeavor to fix the meaning of the phrase, "*authorized by law.*"

When is land authorized *by law* to be sold? Undoubtedly the phrase is susceptible of different constructions; but the *true* meaning ought to be ascertainable with some degree of certainty, from the laws and the judicial interpretation of them.

It could be contended that it meant when, under authority given by law, particular lands were ready to be sold, and individuals could go to the proper offices and purchase them. That would be when they had not only been surveyed, but when they had been ordered to be exposed to public sale, and the day of sale should have come.

But, does the phrase mean that only? Undoubtedly one's lands *are* authorized to be sold, by his authority, which for that purpose is law, when he empowers an agent to sell them presently, the next moment, if he can find a purchaser.

But, also, are not the lands of a testator authorized by his will to be sold, when he gives power to his executor to sell them, not presently, but when he shall see fit to divide them into lots by survey, to advertise them, and afterward to sell them. If he makes these general provisions, and then excepts and reserves certain lands, directing that they shall not

be sold, are not *all* authorized to be sold, by his will, which is the *law* of the matter, except those reserved?

All lands of the United States may be "authorized by law to be sold," when a general law provides for the future survey and sale of all, at the President's discretion, except certain portions which it is declared shall not be sold.

And, as any proposition may be contended for, it may be argued that land is authorized to be sold, by law, when the President of the United States, being authorized to do so by a law, had directed them to be surveyed, and *prepared* for sale; which was the decision of Commissioner Meigs. But certainly one could not yet purchase. The land officers were not yet authorized to sell, but only to get ready to sell. The sale in such case was in one sense *authorized to be made*, because it needed no further authority of *law*, but only the action of the surveyors and other ministerial officers whose duties were already defined by law. It was authorized to be made, at some uncertain time in the future, dependent on the performance of those duties, and perhaps on further order from the President.

As far as the *law* went, the sale was no more authorized by it, after the directions for preparation given by the President, than it was before he had given these directions, but after the law had authorized him to give them. If the law did not authorize them to be sold, when it authorized the President to take, at his discretion, the necessary measures to have them sold at some future time, then *the law* did not authorize it until the moment came when individuals could purchase. The *law* spoke but once; what it authorized, it authorized *then*. If one has property, real or personal, which is his to sell, and he executes authority to an agent to sell it at his discretion, but certain things are necessary to be done before he can sell it, as for example, to have it brought from a distance, or to pay certain charges on it, or to have certain repairs made, and the agent is not restricted to the time, but may at his pleasure delay doing these things,

or selling after they are done, can it be said that the sale of the property is not *authorized* by the owner, until the agent actually *offers* it for sale, or until the preliminary arrangements have been effected? Has not the owner authorized the agent to sell, though at some future day? It may be answered, He is *not* authorized to sell, because he *cannot* sell, as yet. But if the agent's power to sell was to be created by written authority from the principal, would not the word "authorized" necessarily mean the receipt of that written authority; and could it be said that he would not be authorized thereby to sell, until he chose to do, or until he had done or effected certain things, which he might delay doing as long as he pleased?

So it is *the law* by which the sale is to be authorized; and not the order or direction of the President. The sale is to be authorized *by law;* and there is and can be no middle ground; either it is authorized by law when the law ends its functions, utters its word, and, giving the authority, leaves it to be exercised when the President shall please, circumstances permit, or the necessary preliminaries can have been arranged; or it is not authorized by law until the moment when sales can be *made*. The word "authorized" can have but one of two meanings. An act is either authorized to be done, when authority is given to do it, or when, under authority previously given and then become effectual, it can be done. Now, suppose a man executes a power of sale, the sale to be made at the discretion of the agent, or as soon as he can have the land surveyed and laid off into lots—can it be said that there is no power to sell until the moment when he is ready to make the sale? In one sense it could be said that he had no *power* to sell, until he *could* sell; but that is not the legal meaning of the word. The power to sell, in the legal sense, has existed from the moment of the execution of the instrument containing the power; and whenever the sale may be made, *it will relate to the date of the power*, and cut out incumbrances created by the owner

after giving the power. *Authority* is a word that has a meaning to which only one meaning of the word *power* answers. The President derives his *authority* from a certain act under the Constitution. That is his *power* of attorney; but he may not have the *present* power to do the act at all, but only to do it when a certain contingency arises. A person acting by authority of a Court, of a law, of a will, has the *authority* to act, *before* he can *do* the act.

The words "by law" in the phrase "authorized by law" explain the meaning of the word "authorized." They fix and confine it. If we say that one is authorized by a will to do certain acts, we mean that the will gives him the authority to do the acts; not that he *can* now *do* them; that he can now *exercise* the *authority* which he *possesses*. We are fully authorized to do many things that we never do. A sale of lands might be authorized by law, and yet the sale be impossible at first, and continue so, or become impossible by subsequent events, or by an enemy's conquest of that portion of the country.

The truth is, no doubt, that the word *authorized* had no reference to authority given to any one to sell the lands, but had the more general meaning of *sanctioned, permitted or allowed*. Idioms are *authorized* by usage; a marriage *authorized* by law is one that the law permits to be solemnized, or makes legal; to *authorize* a report or opinion, is to give authority, credit or reputation to it; reason *authorizes* certain conclusions or deductions. Land, the sale whereof is authorized by law, is simply that which the law, making general provision for selling the public lands, does not declare shall *not* be sold.

And the various acts of Congress in regard to the disposition of the public lands permit of no possible doubt that this was the meaning of the phrase.

By resolution of the Congress of the Confederation, of 21st April, 1787, it was provided that after the Secretary of War should have drawn certain lands, the remainder should

be advertised for sale, and, at the expiration of five months, the sale of the land should commence and continue from day to day. Old Journals, Vol. 4, p. 739.

And on the 9th of July, 1788, it was ordained, "that the Board of Treasury be, and they *hereby* ARE, *authorized* and *directed to sell* certain lands, on the same conditions and under the same restrictions and limitations as were prescribed in the resolutions of April 21, 1787, except as to the place of sale." Old Journals, Vol. 4, p. 832.

The expression "*authorized to sell*" occurs here for the first time, so far as we have been able to discover, and it is clear that the sale was understood to be "authorized" *by the ordinance*, at its date, though not to be *made* until afterwards. And by what peculiar logical process any one reaches the conclusion that when the law says, "the sale of the lands herein mentioned *is hereby authorized*," the sale of those lands is not then authorized, is not thereby authorized, our wit does not enable us to comprehend.

So in the act of May 26, 1824, for the disposition of certain lands retroceded by the United Brethren, (4 Stat., 50,) we find, "the President shall be, *and he is hereby, authorized*, whenever the boundaries of the several lots, &c., shall be ascertained, to issue patents," &c. Sec. 5.

The act of 18th May, 1796, entitled "An act for providing for the sale of the lands of the United States in the Territory northwest of the River Ohio, and above the mouth of Kentucky river," (1 Stat., 464,) provided for surveying *all* those lands, and for selling as soon as seven ranges of townships should have been surveyed, in one of three specified localities, and the undivided townships afterwards. And it was, as its language reads, an act *providing* for the sale of *all* those lands, directing them to be offered for sale, and authorizing them to be sold. All were to be sold "under this act;" "disposed of by virtue of this act." Could it be said that the sale of them was not "authorized by law" as soon as the act passed?

On the 10th of May, 1800, an act to amend this act was passed, (2 Stat., 737,) "for the disposal of the lands of the United States, directed to be sold" by the former act. It prescribed the making of surveys, the offering for sale, the selling at private sale, &c.; provided by the 4th section that the Registers, of two offices, at one of which no public sale was provided for, *might* sell *any* of the lands within their districts, at private sale, after a particular day; and the 16th section gave rights of pre-emption to persons who had erected, or begun to erect, mills "upon any of the lands *herein* directed to be sold."

Certainly, to *direct* lands to be sold is to *authorize* them to be sold; and lands were, by this act, thus directed and authorized to be sold, which had not yet been surveyed.

The act of 3d March, 1803, regulating the grants of land, and providing for the disposal of the lands of the United States south of the State of Tennessee, secs. 10, 11, 12, (2 Stat., 233,) provided for surveying *all* the lands in the Mississippi Territory, east and west of Pearl river, and for their sale, with certain specified exceptions, at such times as by proclamation of the President should be designated. And the act of 26th March, 1804, for the disposal of the lands in the Indiana Territory, made the same provisions, by secs. 1 and 5, (2 Stat., 277,) as to *all* the public lands of the United States in which the Indian title had been or should thereafter be extinguished, north of the Ohio and east of the Mississippi. *All* these lands, it was provided, should be sold on such days as the President should designate by proclamation.

And sec. 10 provided how all the public lands of the United States, "*the sale of which* is *authorized by law*," might, after they had been offered for sale to the highest bidder, be purchased by whole, half, or quarter sections, at the option of the purchaser.

Evidently the phrase as here used meant all of the lands of the United States, which, not being reserved, or their sale

otherwise forbidden, were or might be the subject of sale. For the provisions that they may be sold at private sale by parts of sections, and that, in that case they shall be subdivided in a particular way, are general, applying to all lands that may at any future time be offered for sale to the highest bidder.

The phrase in question is precisely the same in effect and meaning as the phrase "directed to be sold at public sale," in section 12. The provision here is, "that *all* the other public lands of the United States, either north of the Ohio or south of the Tennessee, *which* ARE *directed to be sold at public sale*, shall be offered for sale to the highest bidder in quarter sections."

Now, most of these lands were not to be sold, under the two acts, until the President should, in his discretion, direct it. Yet all these are "public lands directed to be sold by law," and of course *authorized* by law to be sold; for no further *legislation* was necessary. The law had done its work and performed its part; and when it said that all the lands, with certain specified exceptions, might be sold, it *authorized* them to be sold.

The act of 2d March, 1805, sec. 7, (2 Stat., 329,) extended over all the public lands of the United States to which the Indian title had been, or might thereafter be, extinguished in the Territory of Orleans, the powers vested by law in the Surveyor of the lands of the United States south of the State of Tennessee; and made it his duty to cause such of said lands as the President should expressly direct to be surveyed and divided; and the supplementary act of April 21, 1806, (2 Stat., 391,) sec. 11, enacted thus: "That the President of the United States be, and he *is hereby*, authorized whenever he shall think it proper, to direct so much of the public lands lying in the Western District of the Territory of Orleans, *as shall have been surveyed*, in conformity with the provisions of the act to which this act is a supplement, to be offered for sale." He was *thereby* authorized to

offer them for sale, though they were not even to be surveyed until he should expressly direct it. Was not authority to offer them for sale, authority given by law to sell? And if the *offering* them for sale was, *then* and *thereby*, by that *law*, authorized, was not their *sale*, *then* and *thereby*, authorized by law? What juggling with words can make it otherwise? Only that of giving the wrong meaning to a word that has two or more, according to circumstances, which is that *cavillatio*, "*ut ab evidenter veris per brevissimas mutationes disputatio ad ea quæ evidenter falsa sunt, perducatur*," so largely used in the controversies of the modern forum.

So, in the act of the 31st March, 1808, sec. 1, (2 Stat., 480,) we read: "That, whenever the President of the United States has been or may be authorized to cause the public lands, in any land district, to be offered for sale it shall be lawful," &c.

But the act of 15th February, 1811, is conclusive as to the meaning of the phrase in question. The act of 28th February, 1806, (2 Stat., 352,) had extended over *all* the public lands of the United States in the Territory of Louisana, to which the Indian title had been, or thereafter might be, extinguished, the powers vested by law in the Surveyor General. The act of February 15, 1811, (2 Stat., 665,) for the final adjustment of claims to lands, and for the sale of the public lands, in the Territories of Orleans and Louisiana, conferred on the President the same powers, in regard to the public lands of the Eastern District of the Territory of Orleans, as previous laws had given him in regard to those in the Western District, and extended to the Western District all the provisions of those laws in relation to the sale of lands. It established land-offices, and provided that they should be opened on certain days, for sale of all the public lands, with the exception of certain reserved lands, which should have been previously surveyed and the surveys thereof returned according to law; and for certain other lands that could not be surveyed in the ordinary way, and that should have been

advertised for sale, with the approbation of the President. And then it provided (sec. 6) that, from and after a certain day, any tract, that had been thus offered for sale and remained unsold, as well as any tract embraced by the provisions of the 3d section of the act (which embraces all the lands in the Eastern Land District of the Territory, and south and north of Red river, in the Western, "the sale of which is authorized by this section,") might be disposed of at private sale. Here is a "sale authorized by law," of lands, many of which were not surveyed, nor even ordered to be surveyed: and we have here a definition, given by the law itself, of the meaning of the phrase, "the sale of which is authorized by law." Here it is, "the sale of which is authorized by this section;" and the law declares that *it* authorizes the sale of them, by directing their survey at such times as the President shall deem proper, and their sale when he shall see fit to order it.

By the 8th, 9th, and 10th sections, the Surveyor General was required to cause to be surveyed such of the public lands in the Territory of Louisiana as the President should direct; a land office was established; and the President was *thereby* authorized, whenever he should think proper, to cause so much of the land as should have been surveyed, to be offered for sale; and all such lands, certain reservations excepted, were to be offered for sale to the highest bidder, on such day or days as the President should by proclamation designate.

In the act of March 3, 1811, passed in lieu of that of February 15, but making, for the most part, the same dispositions as to surveys and sales, we find again the expression, "the sale of which is authorized by this section," applied to lands yet to be surveyed, and to be sold as well as surveyed at the President's direction. Also the expression, "also the lands sold by virtue of this section," and, undoubtedly, a sale *by virtue* of a law, is a sale *authorized* by it. How could it be "by virtue *of* it, if not "authorized"

by it? We find the two expressions in section 6, within five lines of each other.—2 Stat., 663.

In the Territory of Louisiana, *no lands at all*, except private land claims, had then been surveyed. The public surveys had not yet commenced. This act provided for the survey of such of them as the President should direct, for the establishment of a land office for their sale, and for the sale of such as might have been surveyed, when the President should think proper. "The President of the United States be, and he *is hereby* authorized to direct," it said, such as might have been surveyed, to be offered for sale. If that *law* authorized him to *offer* them for sale, did it not authorize their sale? Certain specified reservations were made (sec. 10); and all the rest were to be sold to the highest bidder.

The act of 17th February, 1818, authorized the establishment of a land office at the seat of justice of the county of Arkansas, in what is now the State of Arkansas; which was to be opened whenever the President should think that land enough in the district had been surveyed to authorize it; and it provided, that when either should have been established, the President of the United States "shall be, *and he is hereby authorized*," to direct the lands surveyed to be offered for sale, with certain reservations and exceptions. 3 Stat., 406.

The act of April 24, 1820, (3 Stat., 566,) which abolished the credit system upon sales of public lands, provided for *all future sales* of such lands, which were to be offered in all time thereafter, in quarter sections. It fixed the price of such lands permanently. It provided for surveying and subdividing them. In the 1st section it speaks of "all the public lands of the United States, the sale of which *is* or *may be* authorized by law," because lands to which the Indian title was not extinguished, and reservations not then authorized to be sold, might become so subsequently by ex-

tinguishment of the Indian title, or repeal of the reservations.

But, in sections 4 and 5, we find the expressions, applied to *all* future sales, "any public sales hereby authorized;" and "the several public sales authorized by this act;" applied as well to lands that might subsequently revert to the United States, as to any other; and the public sales spoken of have reference to the general provision, in section 3, that *at every public sale*, no matter when thereafter made, the highest bidder should be the purchaser. All such sales, through all coming time, were "authorized by this act;" were "further sales hereby authorized."

There cannot be a better definition of the meaning of the phrase than that which the law itself gives, in the act of 11th May, 1820, to annex certain lands to the District of Detroit. (3 Stat., 577.) By it, *all* the public lands in the Territory of Michigan, to which the Indian title was extinguished on the 24th of September, 1819, were attached to and made part of the District of Detroit; and the second section provided, "That the lands aforesaid, to which the Indian title has been extinguished, and which have not been reserved or appropriated, by existing laws or treaties, shall be surveyed and offered for sale, under the direction of the President of the United States." With the exceptions specified, the sale of all these lands was then authorized by law.

These references need not be further extended. They leave no room for judicial interpretation. The Congress of the United States had plainly shown in what sense it used the phrase "authorized by law," over and over again, and so plainly that he who ran could read, before the New Madrid Act used it again.

And we should not have thought it necessary thus by the laws themselves to demonstrate the meaning of the phrase, if that given it fifty and more years ago were not still insisted on in this case, by the learned counsel of the Government, who, unconverted by this demonstration, argue that

the meaning must be as they claim, because, unless it were so, and as the New Madrid Act specially reserves the lead mines and Salt Springs from location, the restriction to lands, "the sale of which it authorized by law," excepts nothing and amounts to nothing. But the decisions of this Court which they quote here tell them that by this phrase lands covered by incomplete Spanish and French claims, and rights by possession, recognized by Congress, were protected against location by New Madrid claims. *They* were lands, the sale whereof was *not* authorized by law, but forbidden, and these claims covered a large quantity of land.

At the date of the New Madrid Act, not a single foot of land in the Missouri Territory was authorized to be immediately sold. Not a foot had then been surveyed, with the exception of private claims. The first *order* of survey was given in *March*, 1815. No *sales* of lands in the Territory were proclaimed by the President until 1823.

On the 6th of March, 1816, the Commissioner of the General Land Office notified the Surveyor General at Chillicothe that the President had directed about one hundred townships to be surveyed, and prepared for sale, in the Territory of Missouri, in the vicinity of St. Louis; and informed him that the Register at St Louis had advised as to the lands that ought to be first brought into market Land between the Rivers Mississippi and Missouri had been directed to be surveyed into two hundred *townships;* and it was now directed that they should be subdivided for sale. Instr. & Opin., 312.

According, therefore, to the notion of Mr. Commissioner Meigs, that sale was authorized by law, only of lands that the President had directed to be surveyed and prepared for sale, *there was not a foot of land in Missouri, when the New Madrid Act passed, on which a New Madrid claim could be located.* That, of itself, is enough to show the absurdity of his opinion. For, to suppose that Congress meant what *he*

supposed it did, is to impute to it gross ignorance or singular folly.

Moreover, the sale *could* no more be presently made, when the direction to survey was given, than when Congress authorized it to be given; and the sale was no more *authorized*, in either one or the other sense of the word, at one of these times than at the other. If the sale was authorized to be made, at any moment before it could be made in fact, it was authorized by the law, at its passage. Otherwise, it was not authorized until the moment came when the land officers could say to the public, "Come and buy! We are now ready to sell." Mr. Commissioner Meigs probably saw that it would not do to impute that meaning to the phrase, and so egregious a stupidity to Congress; because, under that construction, it was uncertain *when* a claim could be located; and so he planted himself on a nonsensical middle-ground, for which he could find no warrant anywhere. He made a feeble attempt to give a reason, saying that the act of 3d March, 1811, directed that *certain* lands should be surveyed; that a land office should be established, and that the lands *so surveyed* should be offered for sale. *Wherefore*, he said, locations can be made only on the lands *directed* to be surveyed, for the purpose of being offered for sale at St. Louis.

His second letter shows that he meant "directed by the President": and that being so, we fail to see the "wherefore." The act was not a temporary one; it directed the Surveyor General to survey such of the public lands as the President should direct *at any time* thereafter. For the disposal of any and all of these, a land office was established; and whenever any of the lands might be surveyed, the President "*is hereby authorized*," the act said, to direct it to be sold. He had directed certain lands to be surveyed, when Mr. Commissioner Meigs guessed at the meaning of the law. He might *never* order them to be sold. It was wholly for him to judge when it would be proper to do so. How, then, according to the Commissioner's own notion, were they *then*

authorized to be sold? They could not *be* sold, until the President ordered it. Was it that he was authorized to order it? How authorized? Was this because they had been directed to be surveyed? That direction was his own act. How did his own act *authorize* him to do another act? Was it because he *could* not order a sale, until he had first ordered, and then had, a survey? He *could* not order a survey, until Congress gave him the authority to do so. Then he was authorized to do it, and in due time to order a sale.

If the President was "authorized by law" to make sale of the lands directed to be surveyed, as soon as he had given the direction, it was because the phrase "authorized to sell" or "sale authorized" did not mean that he had authority and power to sell immediately, (which he did not have,) but that he was *then* authorized to sell as soon as the land should be surveyed, proclaimed for sale and advertised. It could not mean that he would then *become* authorized, because if he was to *become* authorized after a time, he *was* not authorized at that prior time. Consequently it is demonstrated that he was authorized then, precisely as he was when the act passed and no more so; authorized to order sale of all the lands in the Territory, when he should have had them surveyed. If ever the President has had other and further authority to order sale of lands in Missouri or Arkansas, he did not need it. The act of 1811 gave him that power, as to all the land in the whole Territory, and authorized the future sale of all without further legislation. If there had never been any subsequent law continuing the authority, all the sales ever made in either State would have been "sales authorized by the law" of 1811.

IN BRIEF;

When a law says "the sale whereof is *hereby* authorized," does IT *not* authorize the sale? Is not the sale, are not all future sales authorized by *it?* Or are they *not* authorized by law, *because* authorized by it?

More than one statute speaks of sales far in the future, as "*hereby* authorized." Are they not *then* authorized by law?

If the law itself cannot be allowed to define the meaning of the phrase it uses, is it not all guessing?

When, then, *is* the sale authorized?

Does the phrase mean, lands that can be sold *now—to-day*?

Does it mean when the President *directs* them to be surveyed?

Or when they *have been* surveyed?

Can they be sold on *that* day?

Is it, then, when the President issues proclamation for their sale?

That only authorizes them to be sold at a future day.

Who ever had the right to fix arbitrarily on the date when lands are surveyed, as the time when their sale is authorized *by law?*

Does the phrase mean, "the sale of which is authorized by law to be MADE *now?*" If it does not, necessarily it means—"the sale of which is authorized by a law now in force, to be made by and by"—"when a certain day arrives, or when certain things have happened or been done."

Who ever had a right to say that it meant the former? or that it meant "the sale *will be* authorized by this act, when the land shall have been surveyed?"

How is the sale *authorized by law* when the lands have been surveyed, more than before?

Because until after that they still could not be sold? until something further done?

Could they be sold till after proclamation? They might not be proclaimed for twenty years after survey?

Finally, as no point of time between can be fixed on, and the sale is authorized by law, when the law authorized it to be made by and by, or else it is not authorized by law until the moment when a man can go and pay for it and be pur-

chaser of it, the question suggests itself for what reason a man having a right in 1815 to locate 200 arpents of land should have been forbidden to do so upon any particular land, until the moment came when any one who pleased could go and buy it? What purpose could such a rule have been intended to effect, what interest to subserve, what mischief or abuse to prevent? If none, then it would have been simply irrational, without motive, and to put such a construction on the phrase is idle nonsense.

AS TO THE INDIAN TITLE.

If Congress, in 1815, recognized the Quapaw title to the country between the Arkansas and Red Rivers, then, undoubtedly, the sale of the lands ceded by the Quapaws in 1818, was not authorized by law in 1815. Congress had the power and right to respect any Indian claims, no matter how worthless, and the acts of Congress that provided for the sale of the public lands always confined their action to lands the Indian title to which had been or might be extinguished.

We know of no evidence that in 1815 the Government acknowledged the title of the Quapaws to the country which they ceded and relinquished by the treaty of August 24, 1818. With the exception of a reservation of the eastern portion, the country ceded had the following boundaries: the river Arkansas from its mouth to the Canadian, and the Canadian from its mouth to its source, on the north; a line due south, from the source of the Canadian to Red River, on the west; Red river, from the point where that line struck it, to the Big Raft, and thence a line to strike the Mississippi, thirty leagues in a straight line below the mouth of the Arkansas, on the south; and the Mississippi on the east; besides "all their claims to lands east of the Mississippi, and north of the river Arkansas. This included all of Ar-

kansas, south of the Arkansas River, some of Louisiana, all the country now occupied by the Choctaws and Chickasaws, and then west as far as the territory of the United States extended and a great way farther. For all this, the United States paid $4,000 cash, and agreed to pay an annuity of $1,000 per annum, leaving, also, a reservation; and thus, except as to the reservation, extinguished the Quapaw "title."

If there was any land in the Territory of Missouri, on the 17th of February, 1815, on which a New Madrid claim could be lawfully located, it could be located on the Hot Springs of the Ouachita; for the Quapaw title to the country south of the Arkansas was no more valid or real, no more thought of or cared for, then, than the Osage claim to all Missouri, and that of the Iowas and Sacs and Foxes to a great part of it. In 1820, at any rate, even that had disappeared, and the sale of the country, including the Hot Springs, was authorized by law.

The Secretary of the Treasury, Mr. Gallatin, on the 2d of July, 1805, authorized the survey of the country included in the Districts of Attakapas, Opelousas, Avoyelles, and Rapides, instructing the Surveyor General at Washington, Mississippi, to inform the white inhabitants, "and several small tribes of Indians who are scattered through that Territory," that the running of the lines was not to affect their rightful claims, and that the object was only to ascertain the vacant land, and to connect the whole together. Instr. & Opin., 794.

Any one of these small tribes had as good a claim to that country as the band of Quapaws had to the whole of that between the Arkansas and Red River. There were quite as good Indian titles to a large part, if not all, of Missouri and Arkansas, for many years after 1815. On the 4th of August, 1824, the Sac and Fox Tribes ceded all the land in Missouri, between the rivers Missouri and Mississippi; and on the same day the Iowas ceded the same Territory. On

the 2d of June, 1825, the Osages ceded lands in Missouri and Arkansas, and their claim to land lying west of those States. June 3d, 1825, the Kansas Nation ceded all the lands in Missouri. September 14th, 1829, the Delawares ceded their lands on James' Fork of White river. October 24th, 1832, the Kickapoos ceded all the land in Missouri. October 27th, 1832, the Kaskaskia and Peoria tribes ceded all the land in Missouri. October 11th, 1842, the Sacs and Foxes ceded all lands west of the Mississippi.

Any single one of these Indian titles was entitled to possess and exert the same virtue in Missouri or in Arkansas, according as the claim was, as the Quapaw title, to prevent pre-emption and New Madrid locations; and the Osage claim a great deal more so; for the Quapaws were but a squad of that large tribe; and the Osages did really claim and *enforce* rights against other Indians over a large part of Arkansas.

And, notwithstanding the Quapaw title, it is a fact, that may easily be verified by the files of the office of the Surveyor General, now in the custody of the Auditor of Arkansas, that the public surveys were in process of execution south of the river Arkansas, preparatory to sale, *prior* to the treaty with the Quapaws.

Parts of Arkansas had been settled by the French more than a century before it became a Territory; and no regard whatever was paid to the Quapaw *title*, except so far as the Spanish laws protected their possession of their arable and pasture grounds around their villages. A hundred years' possession by the French and Spaniards, with actual occupancy, of the country south of the Arkansas, had extinguished the Indian title; and the decision that, because their title was not formally extinguished by treaty until 1818, no one had a right to settle, or could obtain a pre-emption, or locate a claim in all that immense region that lay between the Mississippi and Rocky Mountains, on the east and west, and the Arkansas and Canadian on the north, and Red river

and the line of the present State of Louisiana on the south, was the most ridiculous absurdity imaginable.

So much of it as is now within the limits of the State of Arkansas was made a land-district more than five months before the treaty. All of it that lay on the plains was the hunting and camping grounds of the Comanches or Neum; and the Wichitas or Ta-wai-hash lived on and owned all of it that lay between Red River and the Fausse Ouachita, for a great distance up those rivers; while the Cados or Cadohadachos Sudé or Nas-o-wit, had a better claim to the country from the river Caddo to Red river, than the Quapaws, who, indeed, had none at all.

If to take such a quit-claim is an acknowledgment of title, that is a novel consequence. The French and Spanish Governments had not regarded the Quapaws as having any title, and made the great Winter grants near the Post of Arkansas, and the De Vilemont grant of Point Chicot, on the Mississippi, in the country ceded by the Quapaws afterwards to the United States; and the United States often received cessions from different Tribes, for the same country, really not acknowledging the title of any of them.

But this "Indian title" of two little villages of half-breed French and Quapaws, and a few others, all speaking French and having French names, living here and there on the banks of the Arkansas, was an excellent thing to use against a location of a New Madrid claim in a region that the Quapaws had no more right to, than they had to the Island of Madagascar; and it *has* been used, with extraordinary vigor and effect, being invested with this extraordinary virtue, that after it was extinguished, it continued, as though it were still alive, to be as absolute an obstacle to location as ever.

However all that may be, lands to which Indians had title were "lands the sale of which was authorized by law," as soon as the Indian title was extinguished.

The act of March 3, 1811, section 8, (2 Stat, 665,) in pro-

viding that the Surveyor General should cause such of the public lands in the Territory of Louisiana, as the President should direct, to be surveyed, referred to the law in relation to the lands northwest of the Ohio, and above the mouth of Kentucky river. This reference was to the act of 13th May, 1796, (1 Stat., 464,) by which the Surveyor General was directed to cause to be surveyed the lands to which the title of the Indian tribes had been extinguished. But the reference is not to *this* provision of that act; nor is the Indian title mentioned in the act of 1811. Whenever it was extinguished thereafter, the power of the President to direct survey of the lands, to the survey and sale whereof no obstacle in the shape of Indian title was interposed, was plenary, without the need of further legislation.

For the eighth section provides, "That the Surveyor General shall cause *such of the public lands* in the Territory of Louisiana, *as the President of the United States shall direct*, to be surveyed and divided." They were to be surveyed and divided in the same manner as was provided by law in relation to the lands northwest of the Ohio, and under the same regulations and limitations *as to expenses*.

There was a subsequent proviso, forbidding the sale of lands, claims to which had been presented and filed; and there was no other limitation on the power of the President to order surveys, and upon survey to order sale, except in regard to lands reserved by section 10.

The act of 29th April, 1816, (3 Stat., 325,) made it the duty of the Surveyor General, for whose appointment it provided, to cause so much of the lands of the United States in the Territories of Illinois and Missouri "as the President of the United States shall direct, and to which the titles of the Indian tribes *have been* extinguished," to be surveyed.

That the words "have been" were used in the sense of "shall," or "may have been," must be held, or else there never was *any* authority to survey the lands to which the

Quapaw pretence of title was extinguished by treaty of August 24, 1818.

For, on the 17th of February, 1818, (3 Stat., 406,) a land office was established for the county of Arkansas, for all the country between the Louisiana line (33°) and a due west line from the mouth of the St. Francis river; and general provisions were made for the survey and sale of the public lands in that district, without noticing the existence of any Indian title.

Nor, after the Quapaw title was extinguished, was there ever any provision by law for the sale of the lands which that tribe had claimed. They were *already* included in a land district; and when the Indian title disappeared, their survey and sale were proceeded with without any new authority given by law.

And when, by act of 5th April, 1826, lands *west* of this district were added to it, it was provided (4 Stat., 153) that nothing contained in the act should be construed as authorizing a survey of any lands the title whereof was *then* in any Indian tribe; the authority to survey those the Indian title to which had been extinguished, being thus broadly recognized.

So the act of 2d March, 1827, (4 Stat., 235,) granting two townships of land to the Territory of Arkansas for the support of a university, provided for locating these lands in tracts of a section each, on any of the public lands in the Territory the Indian title to which *had* been extinguished; the legality of the prior survey of these lands being recognized.

We, therefore, on the most careful consideration of the whole question, submit that whenever a law authorized the President to direct, at such time as he might think fit, the survey of certain lands in a certain tract of country, and the sale of the same at such time as he should direct, the sale of

all such lands, except so far as portions were reserved from sale, was authorized by law; and that if, at the time of the passage of the law, the Indian title was not yet extinguished to any portion of such lands, and the power to direct surveys said nothing about the Indian title, these also could be surveyed at any time after that title was extinguished; and at the moment of such extinguishment, if they were within a land district, they in no wise differed from the other of the lands, and their sale also was authorized by law: In other words, of all lands authorized to be surveyed and sold at the President's discretion, the sale was authorized by law; and the phrase really meant no more than, lands not reserved from sale or otherwise appropriated, of all that the President was authorized to cause to be prepared for sale and in due time thereafter to be sold. Wherefore the sale of the Quapaw lands *was* authorized in 1820.

Mr. Attorney General Legaré said, on the 1st of November, 1841: "It deserves to be remarked here—and the remark is one of which we are never to lose sight in discussing subjects connected with the land laws—that these laws, however local they may sometimes appear to be in particular provisions, constitute, in truth, one general system, characterized in the main by the same great outlines, and are, therefore, all to be taken as *in pari materiâ*."—3 Ops. of Attos. Gen., 705.

In the case before him the question was in regard to the country west of the Perdido. By the act of 1805 the powers of the Surveyor of the public lands south of Tennessee were confined to the surveying of such lands in the Territory of Orleans, as the President should expressly direct. Such also was the provision of the act of 3d March, 1811, Sec. 8, in regard to the public lands in the Tearitory of Louisiana.

The act of 25th April, 1812, (2 Stat., 713,) in regard to Louisiana east of the Mississippi, revived the grant of powers vested by law in the Surveyor of public lands south of Tennessee, providing that they should extend over all the

public lands in the said tract of country, without any reference to any direction from the President.

Mr. Wirt held that the power, having been granted to the President by the act of 1805, and not revoked by the subsequent affimative statute, was still continued to him ; and Mr. Legaré said that, if it were necessary, he also would invoke the clause of the preceding statute.

But, he said, the act of 1805 contained a *restriction* on the Surveyor, because a foreign government claimed and held a part of the country in his district ; but in 1812 that obstacle was removed ; and after that he had the same authority there as elsewhere, under the original act of 1796. His powers and duties, he said, were "to survey as soon and as perfectly as possible ; to survey without waiting for the orders of any superior ; to survey with a view to a speedy sale ; at all events to survey." It is clear, he said, that "according to the whole scope and spirit of the act of 1796, if the Surveyor General is in any case whatever *not* to proceed forthwith to survey the public lands, *that case is an exception*, and the burden of proof is upon him that affirms it to exist, to show the special law by which it was created.—3 Ops. of Attor. Gen., 705.

All these powers and duties, he said, were, by the act of 1803, ascribed in express terms to the Surveyor south of Tennessee. "Whenever, therefore, *his powers are extended over any new tract of country*, by virtue of an act of Congress, *the order to survey the public lands in it*, as soon as possible, with a view to speedy sale and improvement, is implicitly conveyed by the same statute."

The act of 29th April, 1816, authorized the Surveyor appointed by it, for Illinois and Missouri, to cause so much of the lands in those Territories to be surveyed as the President should direct, "and to which the titles of the Indian tribes have been extinguished."

Six months before the treaty by which the Quapaws quitclaimed, the United States, by act of 17th February, 1818,

(3 Stat., 406,) included the whole of that region in the district of the Land Office at Little Rock (itself then within the Quapaw claim) for the county of Arkansas, which included the whole country to the Louisiana line.

This act provided for no surveys. It authorized the President to sell any of the lands, in either of the districts, when a sufficient quantity should have been surveyed. The power to survey was unrestricted, and the moment the Indian title was effaced, it could be exercised, under the general provisions of the latter act, and of that of 1796.

The same opinion of Mr. Legaré thus described the purposes of the land laws, and furnished a key for the solution of doubtful questions under them, which it would have been better for those to use who have been engaged for fifty years, by means of cavillation and *piepoudre* objections of strict construction, in defeating the intentions of Congress, and annihilating rights in many cases. Unfortunately, the same vicious propensity to look upon every man who claims a tract of land by grant or pre-emption, as attempting to wrong and defraud the Government, is vigorous and mischievous yet:

"What were the powers of the Surveyor General in the Northwest, under the act of 1796? They were to carry into full effect the great scheme of disposing of the vast domain of the country, as soon as possible, with all the precision of a mathematical arrangement, with a view at once to accuracy in public accounts, *to facilitate sales*, to certainty in titles, and to the laying the foundations of that great social order which has since been built up in that wilderness, and the speediest improvement of the country and increase of population."

He was to survey, without waiting for orders, with a view to a speedy sale. If, in any case, he was not to do it, that case was an exception. Whenever his powers were extended

over a new country, the order to survey it as soon as possible was *implied*.

In July, 1820, there was no reason why that part of Arkansas south of Red river should *not* be surveyed, or why an order from the President to survey it was necessary. If it was not *then* authorized to be surveyed, it never was, for no law ever directed it specially after the treaty of 1818; nor can we find any order or directions particularly referring to it and giving authority to survey it.

If there was authority to survey it, after the law of 1818 passed, there was authority to sell it. Mr. Legaré said, in the same opinion: "I am of opinion that Congress did *authorize* the President to proclaim these lands, because it authorized and enjoined the preparing them for sale." Of course, then, the sale of the lands, no matter how long it might be delayed, was *then* authorized by law. The law, he said, authorized the land to be surveyed—the first great step to sale. It established land offices, and authorized the appointment of a Register and Receiver—*a second step, never taken but with a view to sale.*

Every New Madrid claim located in Arkansas, was located south of the Arkansas river, and was subject to the same objection, that, *when the New Madrid act was passed*, the Quapaw title had not been extinguished. Two were located on lands now included in the City of Little Rock, (those of Peter Porier, and Eloi Dejarlois,) and one on lands adjoining that city, (that of Cockerham.) The two first were perfectly valid locations; but private rascality prevented their being patented; of the third there was a second survey, and an intervening location was held to have priority, and to have defeated it. *Except those locations, and that of Langlois*, every location in Arkansas has been made effectual by a patent.

Favores ampliandi. The whole argument against Rector's claim proceeds upon the opposite maxim. When the Court is asked to adopt this, and narrow the meaning of the phrase

which we have been considering, it is pertinent to ask, upon what particular ground of reason or policy it is to be supposed that the Legislator used the pharse in that narrow meaning?

We have heard no answer to this question except that Congress was enamored of the system of rectangular surveys into Townships composed of so many sections, each a mile square. If Congress had its mind greatly upon this system, it would have said, in the New Madrid act, "upon any land surveyed into sections, and in conformity to the sectional lines." The only objection to that would have been, that there was no such land.

There is not only nothing in the act to show that Congress intended to dictate to a New Madrid sufferer *how* he should locate his warrant; but, by the mode in which the locations were to be made, *i. e.*, by separate and independent private survey, paid for by the party, precisely as French and Spanish claims had been always located, with plat of survey unconnected with the public surveys, the act itself shows that the public surveys were not even thought of. Twice, by general laws, Congress provided for departing from the system of public surveys,—once by the acts of 15 February and 3d March, 1811, (2 Stat. 618-662), for the Territory of Orleans; and again, as to the whole country, by act of 24th May, 1824, (4 Stat. 34). And the extent of country covered by French and Spanish grants was so great, that to increase it by a few locations under the New Madrid act was of too little importance to induce the framers of the law to propose any restriction in regard to the mode of locating. At any rate they *did* propose none; and the only limitations were that the land should be such as the Government did not forbid the sale of, and that no lead mine or salt spring should be included.

As to locality, it was nothing to the Government, where a man located his claim. If it valued the lands at all, it valued those least that were furthest in the interior. It

had agreed to secure lands to its new citizens, and having as yet given them no patents, in 1815, and as it would have been ridiculous to give them for the lands ruined by earthquake, it said to the habitans, "Go where you like, pick out new lands, have them surveyed, and they shall be patented to you; only you must not take lands claimed by others, nor any that we have said we will not sell, nor any lead mine or salt spring." Except as to the steps to be taken after survey, that is literally all that the law said. And yet it is an indisputable fact, that if those who engaged in construing it had had their way, not one human being would ever have got one foot of land, under that plain law, until this day.

They reversed the maxims of the law, and resorted to the narrowest construction of the statute, imposed new limitations on the beneficence, and pared away the rights of claimants until what remained answered to the definition of a point. To construe and administer such acts in that way is little less than a crime.

The parties to be benefited were entitled to a liberal construction of the law. The Treasury Department, the Department of the Interior, and the General Land Office do not weakly indulge in that manner of construction.

It was for the interest and benefit of the United States that the country west of the Mississippi should be peopled. It was desirable that what is now the State of Arkansas should be so, as much as that the country in the vicinity of St. Louis or in the organized counties should be. If it were not peopled, how were more counties ever to be organized? The interest of the United States controlled their policy, and led them to encourage the penetration of the unsettled wilderness by the pioneers of civilization, whose axes have proven more potent than either the sword or the pen. Why should they *not* have permitted New Madrid claims to be located in Arkansas? Surely the land was *worth* less to the Government in an unsettled wilderness of unbroken woods, far

from all the haunts of men, and into which only a "trail" from the Post of Arkansas, traversed by Indian traders and hunters on horseback, had penetrated. Surely the Congress did not desire to compel the claimants to remain in the vicinity of St. Louis, or to select their new lands only in the organized counties.

It is curious with what microscopic vision acts of Congress, making generous gratuities to the unfortunate, rewarding the advanced patrols and pioneers of freedom and civilization for braving the dangers and contemning the hardships of the wilderness, or endeavoring to secure equitable rights to portions of the vast masses of the public lands, have generally been scrutinized by Secretaries, Attorneys General, and Commissioners of the General Land Office. They have for the most part studied the language for the purpose of defeating the objects that Congress had in view, rather than of giving their wise and generous purposes effect. Their arguments have too often worn the appearance and had the savor of the defences of retained attorneys against the justice and right of claims, by means of which practices, it is certain, the most crying injustices have been perpetrated; and there is no more striking example of this truth than the New Madrid claims afford. To crown the injustice, it only remained for the counsel of the Government, in the Court of Claims and here, that and this being courts of *Equity*, to insist upon the proposition that for the failure to do that which the Government officers by unsound and even absurd decisions prevented the claimants' doing, they shall be held in default and their claim be, therefore, deemed imperfect and invalid.

The Congress of the United States had, at different times prior to 1815, secured lands in the Missouri Territory to all who lived upon them at the time of the cession; to every one 640 acres, and an additional quantity for his family; and to those who lived on them ten years, two thousand acres each. Wherever they lived in the Territory, whether near St. Louis, on the Arkansas or Red River or the Ouachita,

the law provided for all, and all had the same right to have their tracts surveyed in any shape they pleased.

By section 15, of the act of March 26, 1804, creating Louisiana into two Territories, (2 Stat., 289,) the President was authorized to give lands on the west side of the Mississippi to any Indian Tribes owning lands on the east side, in exchange for such lands ; under which, and a like law of 28 May, 1830, a vast domain was so exchanged for lands east of the Mississippi, with the Cherokees, Creeks, Choctaws and Chickasaws, extending from the western line of Arkansas to the Spanish possessions, and northward beyond the lines of the Missouri Compromise. At first, indeed, a considerable part of what is now the State of Arkansas, was ceded to the Cherokees and Choctaws ; and even better proof of the little value attached to lands by the Congress of the United States in 1815 may be found in the acts of 24th February, 1810, (2 Stat., 556,) 23d April, 1812, (2 Stat., 712,) and 29th April, 1816, (3 Stat., 326,) providing lands for refugees from Canada and Nova Scotia, by which individuals among these were given, respectively, 640, 960, 1,000, and 2,240 acres of land *east* of the River Mississippi.

Second Objection.

That the Territory of Missouri was, in law, the Territory as organized into counties.

Louisiana was divided into the Territory of Orleans, and the District, afterwards called the Territory, of Louisiana, by act of 26th March, 1804 ; 2 Stat., 283.

And the Territory theretofore called Louisiana, was directed to be called Missouri, and its government provided for, by act of 4th June, 1812 ; 2 Stat., 743.

We have studied these acts with care, and are more at a loss than ever, to understand upon what ground, by what procees of perverted logic, the Secretary of the Treasury, in

1818, arrived at the notion that the Territory of Missouri, as spoken of in the pre-emption act of 1814, was to be deemed to consist of the organized counties only. It was *but* a notion, sustained by no reasoning, and by no other reason of policy even, than that any other construction would give rise to claims throughout the whole country, from the Mississippi to the Pacific ocean.

He said "Congress *could* not intend, in an indirect manner, to bring within the jurisdiction of the Territory, a set of men who had been declared by the Territorial authority to be without it." Why not? Was it necessary, in order for a region of country to be within the Territory, that it should be organized into a county? What law ever said so? By what right *could* the Territorial Legislature have undertaken to cut off from the Territory a vast extent of country, declared by Congress to be a part of it?

There was no warrant for saying that "The Territory of Missouri, within the meaning of the act of Congress, of 12th April, 1814, was the Territory, as organized into counties,"

Construction! There was no construction of that act attempted by him. It provided for the confirmation of incomplete French and Spanish grants, to land, anywhere in the State of Louisiana and Territory of Missouri, anywhere in the Province of Louisiana; for the confirmation of donations "in said State or Territory," and for pre-emptions in "that part of the State of Louisiana, which composed the late Territory of Orleans, or in the Territory of Missouri," where the persons claiming had not removed from said State or Territory. By what right did the Secretary hold that the words "Territory of Missouri" had a narrower meaning in the 5th section, than in the 1st, 2d, and 3d? If a claimant had removed beyond the limits of "the organized counties," would he have removed from the Territory, so as to lose his pre-emption?"

By the act of June 4, 1812, providing for the government of the Territory of Missouri, the whole country ceded by

France, as Louisiana, except the Territory of Orleans, was not only to be *called* Missouri, but to be organized and administered. The Governor was, certainly, under Sec. 2, to see the laws faithfully executed throughout its whole extent; he and the Secretary could reside anywhere in the Territory, and were not confined to the organized counties, under Sec. 9. Persons not residing in organized counties might hold offices of honor, trust, or profit, and were entitled to vote at least for a Delegate to Congress; none of the rights guaranteed and secured by Sec. 14, were confined to those only who lived in organized counties; and *all* the people of the Territory had the common right of using the navigable rivers in the Territory, secured by Section 13. The White river, the Arkansas, and the Ouachita, though running through no organized counties, were public highways, wherever in the Territory they ran. There is not a hint anywhere in the law, that the Governor, Secretary, Judges, and General Officers of the militia were forbidden to exercise their powers outside of the limits of the organized counties.

The county of Arkansas was created by act of the Territorial Legislature of Missouri, passed December 1, 1813, and included all the country between New Madrid county and the Louisiana line; and, as we have seen, a Land Office for this county was established by act of 17th February, 1818. The counties of Pulaski, Clark, and Hempstead were created immediately upon the organization of the Government of the Territory of Arkansas, and these included all the lands their vague claim whereto the Quapaws had relinquished in 1818. In 1820, the Hot Springs were in the organized county of Clark; so that, if the notion of the Secretary of the Treasury *had* had anything of reason in it, there was no objection on that score, in 1820, to the location of the Langlois claim.

And there was not a word, a syllable, or a letter that dictated to him in what *part* of the vast territory he should locate his claim. When the Commissioner went mousing

about for objections, he found nothing in the law of 1815 to indicate an intention to confine the claimants to the organized counties in Missouri. He was looking carefully for reasons plausible enough to seem to justify him in preventing the confirmation of claims, (which has always been the chief end and religious duty of the General Land Office,) and he picked up *that* pretext. He might just as well have confined the right to locate to the city of St. Louis. It would be much better if the supposed *interests* of the Government were consulted less, and the beneficent intentions of Congress, and the honor and good faith of the country, more, in the construction and interpretation of the laws by more than *one* Bureau of the Government.

The lands in Clark county, Arkansas, were just as open to the location of a New Madrid claim, in 1820, as those in the vicinity of St. Louis. Surveys had been made south of the Arkansas, without order from the President, under the general powers of the Surveyor General; and no sale was ordered by the President of *any* lands in the territory until 1823. Lands south of the Arkansas were ordered to be sold as soon as lands in the vicinity of St. Louis. The Commissioner of the General Land Office proposed to restrict locations to the organized counties, because, otherwise, people might locate their claims anywhere between the river Mississippi and the Pacific ocean. Well, suppose one had fancied a location on the summit of the Rocky Mountains, or out on the great plains of the Canadian? What interest had the United States to refuse him the indulgence of his fancy? *He* had to pay the expense of surveying.

Let it be remembered, now, that when the act of 1815 was passed, surveys had been directed of only a limited amount of lands, on the Missouri river, and in the vicinity of St. Louis; and these only into townships; (Instr. & Opin., 809, 812;) and that the New Madrid Act authorized the location made by each party to be surveyed independently. And what is the necessary conclusion? It is that the pur-

pose was to permit the claimants to select any land anywhere in the Territory, surveyed or unsurveyed, the Indian title to which might be extinguished. There is no hint of any intention to confine them to organized counties; none of an intention to confine them to the two hundred townships that had *not* then been ordered to be surveyed; there is no hint of any idea on the part of Congress of compelling the New Madrid claimants to remain in the vicinity of St. Louis; there is no hint of any desire to discourage the exploration and settlement of the wilds of Arkansas. If the land was not Indian land when the location upon it was made, that was enough.

Third Objection.

That the location was made in a square, before any survey of the adjoining land, and did not conform to the lines of the public surveys.

This objection was removed by the act of 26th April, 1822, entitled "An act to *perfect* certain locations and saies of the public lands in Missouri," (3 Stat. 668,) which provided that *the locations* theretofore made, of warrants issued under the act of 1815, if made in pursuance of that act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys.

But, fastening upon the words, "if made in pursuance of law in other respects," those who had the power of interpreting the law held that this Statute did not cure locations made on lands not surveyed nor directed to be surveyed; and so placed Congress in the attitude of forgiving and rewarding those who wilfully disregarded the lines of surveys already run, and of condemning those who in their locations *could* not conform to the lines, because none had been run.

The New Madrid Act had no reference at all to the system

of public rectangular surveys. These were already authorized to be departed from, on all rivers, lakes, creeks, bayous, &c. The plats of survey showed the vacant lands in the intervals between the granted tracts, and anywhere on these vacant lands (where not *reserved* from sale as having on them lead mines or salt springs) the New Madrid claimant could make his location, just as, originally, he located and procured survey of his French or Spanish grant. *There was not a word, a syllable, or a letter* in the law, or in any other law, to restrict or limit his right to choice, his fancy, or his taste. Therefore, each was authorized to go to the Principal Deputy Surveyor and have the quantity to which he was entitled surveyed wherever he chose, and in whatever shape he might choose, with a river or crooked creek for one boundary, if it suited him ; and he would, upon the plat and notes of survey, obtain precisely such a patent as was given for lands held by Spanish grant, surveyed in the same capricious manner, and in every conceivable shape. There was no *policy* to prevent this, *then*. In 1822, when a large extent of country had been surveyed, and most of the claims were located, Congress, for the first time, required the lines of the public surveys to be conformed to.

This Court, in Barry *vs.* Gamble, said: "The principal difficulties standing in the way of issuing patents seem to have been the following: There were New Madrid locations made on lands not then surveyed" (not surveyed at the time of location); "locations made after the lands had been surveyed, but before the survey was returned ; and locations made on lands surveyed, and the surveys returned ; in each case disregardful of the section lines But *all of them* were on *lands that had been surveyed*, and the surveys *duly returned and sanctioned when the act of* 1822 *was passed. On this state of facts Congress acted.* No distinction was made among the claimants ; all fractions created by *prior locations*, in *existing public surveys*, were declared legal and subject to

sale; the *fractions produced* could not be *legal*, unless the *locations producing them* were equally so."

The words "existing public surveys" are not used in the act of 1822. The Court inferred that they were intended, because what the act provided as to fractions was, "and the sale of fractions of the public lands heretofore created by such locations, shall be as valid and binding," &c.

There were undoubtedly cases, when that act passed, in which the locations had been made by survey, before the public surveys. These were as much "frations heretofore created by such locations," as if the public surveys had been made first, and the locations by special survey afterwards. And, upon the same reason, if, at the date of the act, there were locations made by special survey, on unsurveyed lands, the fractions that *would* appear when the public surveys should be *afterwards* made, would have been "fractions heretofore created by such locations," although their limits could only be ascertained by the later public surveys. They would surely not be "created" by those public surveys.

The public surveys are supposed to be correct, and the lines of townships and sections to *exist* before the surveys, which only ascertain where they run, as by astronomical observation and mathematical processes the parallels of latitude and longitude are laid down. *Id certum est, quod certum reddi potest.* The law did not make valid and binding only fractions in *existing* surveys. There was no reason why it should; and such is not the necessary nor proper construction of the act.

Nor does the fact appear by the act, that *all* the New Madrid locations made before the passage of the act of 1822 were on lands that had then been surveyed. Certainly the Langlois location had not been made on such lands. And as, of the 516 New Madrid locations, 172 were not returned to the Recorder until after the passage of the act of 1822, many of them ten or more years afterwards, and several between thirty and forty years afterwards, though surveyed long be-

fore, and as the quantity in a large number of the cases (187) is given in arpents, the presumption is that very many of them were located on land that had not been surveyed in April, 1822; and that the plats and notices were not returned to the Recorder, because the Surveyor General could not sooner send a plat of the public surveys of the adjacent lands.

The act of 1822 forbade future locations, not conforming to the public surveys; but there is not a word in it annulling any locations on lands whereof there were not then existing surveys. And if there is ambiguity in the language in regard to the fractions, if the words used *may* include fractions *created* by prior locations, to be shown by surveys after the act, they must be construed to include all locations theretofore made, by which fractions became inevitable; for all stood upon one footing, in reason, the locations equally deserving to be endorsed, the fractions equally requiring to be legalized.

The learned Counsel of the Government, in the Court below, argued that, because the New Madrid Act provided that no warrant should be located on any lead mine or salt spring, and as the locality of these could not be officially known until the public surveys were made, therefore such locations could not be made until those surveys had been made. "How could either of those officers, or any one else, have such knowledge," he asked, "until after the execution of the public surveys?"

The learned Counsel labored under the disadvantage of not being familar with the old land laws. He ought, nevertheless, to have supposed it possible that a sworn Surveyor, making a survey upon the application of a New Madrid claimant, would become cognizant of the existence of a salt spring, if there were one on the tract, and of that of a lead mine, if its existence were discoverable by such a survey, or in making the general surveys; and that, knowing that neither could

be lawfully located, he would report its existence to the Surveyor General.

Besides, *every* Surveyor was required by law to "note in his field-book the true situations of all mines, salt licks, salt springs, mill-seats, and water courses." So it was provided by the acts of 1785 and 1796, and it was always afterwards the law and practice in regard to all surveys. By Sec. 6 of the act of March 26, 1804, *any* grant thereafter made, for a tract of land containing a salt spring discovered previous to the purchase of the tract, was to be considered as fraudulent and void.

By the act of March 2d, 1805, an agent for the District of Louisiana was appointed, to investigate the titles and claims to lead mines, and collect evidence with respect to the claims to such mines, and their value.

And, by the act of March 3d, 1807, (2 Stat., 441,) the Commissioners' confirmations, of claims not including a lead mine or salt spring, were declared final against the United States. If locations of Spanish claims, upon surveys made before or after the cession, and long before any public surveys, could be *confirmed*, although not allowed to include lead mines or salt springs, this exclusion could as little prevent the location of a New Madrid claim, before the public surveys. If a location were afterwards found to include a lead mine or salt spring, discovered before the location, the law for that avoided the location.

The first decision and instructions under the New Madrid Act were those of July 10, 1816, in a letter from the Commissioner (Meigs) to the Surveyor General at St. Louis. He said that the act was silent as to the form of the survey; but that its language "may be fairly construed to leave the form of the survey to the discretion of the Surveyor;" and added, "if none of the claimants have applied to locate, nor should locate their claims prior to the survey of the lands to be sold at St. Louis, they must afterwards locate according to sectional lines.—Inst. and Opin., 815, 816.

Mr. Wirt thought that the rectangular system of surveys was especially dear to the legislative mind, and intended to be adhered to in locations under the New Madrid act. To construe laws in a restrictive sense, by what is supposed or inferred to have been the legislative intention, is an ill habit. On the 26th of July, 1813, the Commissioner, writing to the Register at New Orleans, said, "with respect to the tracts, 58 poles in front and 465 in depth, it had been found that the peculiar nature of the country, very irregularly interspersed by lakes, bayous and water-courses, would, under the sectional system of surveying, present tracts to the purchaser of such undesirable, inconvenient and confused mixtures of land and water, as to destroy a greater part of their value: *that the inhabitants had always been accustomed to prefer, and to be indulged therein by the Ancient Government*, tracts fronting upon lakes, bayous, &c. It was deemed expedient, therefore, partially to depart from the old system, and make the surveys agreeably to the nature of the country; for which purpose provision was made by the act of the 3d March, 1811." Instr. & Opin., 281.

This act was still in force in 1815. The Attorney General, therefore, had much less reason than he supposed, for "inferring" what he did; especially as, to do so, he had to replace, in the action and operation of the New Madrid act, its plain words by words such as these: "Those habitans whose lands have been ruined by earthquake shall each have an equal quantity elsewhere,—when there shall by and by be lands that shall have been surveyed, and by the President directed to be sold. Then they may locate the lands hereby provided to be given them, according to the sectional and quarter-sectional lines. At present, there being no lands surveyed, they can make no locations; and when it will be permissible, it will not need that they should have surveys made, thereby to locate their claims, because the Government will then have its cherished system so extended, as to be able to offer them a few quarter-sections, out of which

they may select, not what they would wish, but what they can get."

Mr. Wirt, indeed, went further, adding to this paraphrase, the words "but they will not be permitted to locate their claims on any lands, the sale whereof was not authorized by law, on the 17th of February, 1815, when the sale of *no* land in the Missouri Territory *was* authorized by law, because no sectional lines had then been run."

That is precisely what the Government of the United States *did* say and decide, by its Attorney General, and adhered to by its Secretary of the Interior thirty years afterwards. One who had vainly imagined that the law meant what is said, might not have been so far wrong, if he thought that construction of law by lawyers was roguery of the intellect, and if he had said

"At scio, quo vos pacto soleatis perplexarier:
"Pactum non pactum est: non pactum pactum est, quod vobis lubet."

THE FIFTH OBJECTION.

That the sale of lands is not authorized by law until they have been surveyed.

Which standing on the same grounds as the proposition that the sale of lands is not authorized by law until they are *directed* to be sold, is already fully answered.

THE SIXTH OBJECTION.

This, which was not commended even by plausibility, was raised by Mr. Attorney General Wirt, in 1825 and again in 1826. It was that the phrase "the sale of which *is* authorized by law" required that the sale should have been authorized by law when the act of February 17, 1815 passed; and

that as the lands that included the Hot Springs were at that time claimed by the Quapaws, and their title was not extinguished until August 24, 1818, New Madrid locations and pre-emptions on such lands were void.

We have already quoted Mr. Wirt's decisions upon this point.

He considered only the meaning of the little word "*is*." It did not occur to him that the meaning of the word "authorized" might be "warranted, permitted, sanctioned, not forbidden"; and that of "authorized by law," to sell which "there is legal authority, warrant or power"; and he read the phrase as if it were written, "whereof there is present authority of law to make immediate sale." He considered the single question whether the word "now" was understood; and he decided that *ex vi termini*, by "*is* authorized" was meant "is authorized now."

If he had been right, then the question would have at once arisen, what is meant by the word "authorized;" but that he did not entertain. Accepting one meaning among many, and that the wrong one, he fell into a grave error, which, if his decision had governed in every case, would have destroyed every title gained by the location of a New Madrid claim. It was one of those of which we may say with reason, Voluntate judicum magis quàm auctoritate lites dirimuntur; after which it is refreshing to read the earnest and wise words of a man like Legaré, who was not a case-lawyer or a statute-lawyer, but magister jurisque peritus; vir illustris et facundissimus, inclytæ recordationis; similiter eloquentiæ et legitimæ scientiæ artibus decoratus.

He sees the difficulties in the way to a great and true decision, interposed by the sticklers for strict construction and the microscopic mode of argumentation; and he admits them, and that the questions are difficult; but he understands what method of interpretation of beneficiary laws is alone consistent with the self-respect of a Republic, alone in keeping

with its dignity and magnanimity, alone preservative of its honor; and whereby alone it should not incur the reproach

Non intrat unquam Reipublicæ limen fides:

And *that* method of interpretation is *not* the one that was adopted fifty-five years ago, for the act for the benefit of those whom the Nation pitied, because the hand of God had shaken their homes into ruins.

That there was no conceivable reason why a party should not be permitted, in 1820, or 1825, to locate with any claim, lands the sale of which might *then* be authorized by law, as well as those the sale of which had been authorized ten years before; and that on the contrary, the policy of the Government and the interest of the country made it preferable, in order that the newly acquired possessions of the United States might be speedily brought within the domain of civilization, seems never to have occurred to Mr. Attorney General Wirt. He fixed his regards on the word *is*, and never looked beyond it.

And the same decision was made twenty-six years afterwards, by Mr. Secretary Stuart; and upon it, in part, the decisions of a former Secretary and of the Attorney General were overruled, and Rector denied a patent; while the same Secretary permitted a certificate of entry and purchase to be given to the holders of a fraudulent pre-emption claim, for the same lands; after he had decided that the reservation by the act of 1832 was not removed by the act of 1843; and in the face of the express disposition of that act of 1832, forbidding any *entry*, *location*, or appropriation of the same lands.

When Mr. Secretary Stuart thus declined to assent to the well considered opinion of a great lawyer, of whom as the American Papinian, all the profession may justly be proud,—Mr. Attorney General Reverdy Johnson, Ulpian's words were verified, Neque enim utique melius pronuntiat, qui novissimus sententiam laturus est. It was a case in which

the later magistrate instead of correcting the injustice or error of a Master of the law, bene latam sententiam in pejus reformavit.

Mr. Wirt's was a "stunted verbal interpretation;" and after the lapse of half a century, its mischievous consequences have not ceased. Of all the powers of evil, few are so patent as this mode of interpretation of the law. For here error is injustice and inconsiderateness criminal. To take from a man by force what is his own, is by far less odious than to do it by erroneous decision, when the error is so plain as to admit of no apology.

And because Mr. Wirt was a man of learning and of singular ability, there is all the less excuse for an error into which a student of the first year ought not to have fallen. A great name cannot make an absurdity respectable.

"All laws," Jeremy Taylor says, "do infinitely decline all harsh senses, and are ambitious of gentle and benign interpretations." But this, eminently true in regard to the "benefits and grace of Princes," which, and the acts of generosity of republics no less, have always imperiously demanded to be liberally construed, was never more completely forgotten than in the legal constructions put upon the New Madrid act in 1820.

"He that openly or manifestly *strikes* a bishop or a priest, *is*," said the laws Ecclesiastical which were anciently of force in England, "*ipso jure* excommunicate."

"Of the same consideration it is," the same great writer says, "when the sentence of the law is set down with the verb-substantive *sum*, of what tense soever. . . . Thus, if a law says, 'He that *is* absent from his parish without just cause to be approved by his Bishop, above six months, *est*, or *erit infamis*, *is*, or *shall be* infamous,' the sentence is *ipso jure lata*, &c."

And the Bishop sums all up by saying this, to be especially commended to the consideration of all Departmental expounders of statutes and grammarians: "But concerning

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this particular, who pleases to be critical and curious in minutes may delight himself by seeing seventy-five fallencies, and alterations of cases, by the variety of tenses expressed in words of law, in Tiraquel, in his excellent and large commentaries, in the interpretation of the word *revertatur*. For my own part, I am content to assign such measures as are sure, plain, easy, and intelligible. Nobis non licet esse tam disertis."

"Scire leges," (I quote still from Taylor,) "non est verba earum tenere, sed vim ac potestatem, say the lawyers. The mind of the law-giver is more to be regarded than his words. For words change and things change, and our expressions sometimes the more literal they are, the more obscure they are, because there are more words than things, and the circumstances and appendages are the best commentary.

"Leges perqùam egregiæ res sunt: sed is qui legibus utitur nimiùm exactè, videtur esse scycophanta, said MENANDER.

. . . For, nullam rem neque legibus, neque scripturâ ullâ, denique ne in sermone quidem quotidiano atque imperiis domesticis recté posse administrari, si unusquisque velit verba spectare, et non ad voluntatem ejus, qui verba habuerit, accedere. Cicero, Lib. 2, de Invent.

"Non debet aliquis considerare verba, sed voluntatem, cùm non intentio verbis, sed verba intentioni debeant deservire," the Bishop quotes from the Roman law, and in explanation says, "We must, in discerning the sense of the law, take in altogether the antecedents and the consequents, and if darkness be over all the face of the law, then the intention is to be judged by circumstances, by the matter and the occasion, by the story and by use."

If Mr. Wirt had *known* that not a foot of land had been surveyed or ordered to be surveyed in Missouri, in February, 1815, and that to confine the locations of New Madrid claims to lands *then* surveyed was to defeat the law and annul it, he

would have hesitated long before working results so serious, upon a grammatical nicety, wherein a little reflection would have shown him his error.

"The law is then abused, when you keep the words of the law and prevaricate in the sense and meaning." "That is the meaning of the *words* of the law, that does the *work* of the law;" and that is the first rule of equity.

The same phrase, "the sale of which *is* authorized by law, occurred in the act of March 26, 1804, (2 Stat., 277), which authorized the sale, on direction by the President, of lands in the Indiana Territory, with certain specified exceptions; and section 10 then provided "that all the public lands of the United States, the sale of which is authorized by law, may, after they shall have been offered for sale to the highest bidder, in quarter sections, as hereinafter directed, be purchased, &c."

This law provided for surveying all of the lands north of the Ohio, and east of the Mississippi, to which the Indian title had been or should thereafter be extinguished; and the phrase "the sale of which is authorized by law" undeniably meant lands by any law of the United States authorized to be surveyed and sold, *at any future time;* for it was certainly applied to lands which not only *had* not been surveyed, but which might not be for many years, it being wholly uncertain when the Indian title would be extinguished. The very reading of the section shows the meaning so clearly that he who runs may read: "All public lands of the United States, the sale of which *is* authorized by law, *may*, after they *shall have been* offered for sale to the highest bidder, be purchased" at private sale.

The truth is, that the words *is*, *are*, *has been* and *have been* are constantly used in the statutes in a future sense. Thus, the act of April 29, 1816, (3 Stat., 330,) gave a right of preemption to each person who "*is* settled on a portion of a section," &c.; and yet the very next section uses the expressions "*shall be* settled," and "*are* settled" as synonymous.

The ordinance of May 20, 1785, directs the Board of Treasury, &c., to return receipts, within 18 months to the Secretary at War, for all deeds which *have been* delivered; and as these deeds were to be executed and delivered after the passage of the act, and from time to time, the words *have been*, in the perfect tense, evidently meant *shall have been.*

In the act of March 3, 1803, regulating grants of land, &c., § 6, (2 Stat., 230,) we find, "and when it shall appear to the said commissioners that the claimant *is* entitled to a right of pre-emption by virtue of the 3d section of this act," they are to certify to it, and that he *is* entitled to a patent. Was not "*then*" understood after "*is*"?

The act of March 2, 1805, Sec. 4, (2 Stat., 326,) uses the expression, "where lands *are* claimed," to mean where they *shall be* claimed before Commissioners; and it directs what the Commissioners shall do, when satisfied that the grant, warrant, or order of survey *is* antedated or fraudulent. Yet one of these, made after the passage of the law, and antedated, would of course have been included.

The act of March 3, 1807, (2 Stat., 441,) provides that "no more land shall be granted by virtue of this section, than *is* actually claimed by the party." If a party had claimed 500 arpents, at the date of the passage of the law, but afterwards reduced his claim to 200, could the Commissioners have awarded him more than he *then* claimed?

The 2d section of the act of February 20, 1811, (2 Stat., 618,) provides that, at any indefinite period thereafter, when any tracts of land shall have been sold, and not fully paid for, it shall be lawful to offer the same for sale, at the time and place of the sitting of the court for the county in which the land office *is* kept, for the district to which the tract *belongs*. Is it not plain that *is* and *belongs* had a future meaning?

So, in the act of March 3, 1811, Sec. 5, (2 Stat., 663,) we find the phrase: "Every person shall, within three years from the passage of this act, deliver a notice, &c., stating the situation and extent of the tract he *wishes* to purchase."

The phrase "*shall be* authorized to locate on any lands the sale of which is authorized by law," is of the same kind. The word *then*, or the words *at that time*, after *is*, are understood.

So in the 6th section of the same act, speaking of land directed by the act to be subsequently sold, it is enacted, that "any tract which *has been* thus offered for sale at public sale, and *remains* unsold," &c. Would Mr. Wirt have held that this meant lands that *had* been offered, and remained unsold, *at the time of the passage of the act?*

So, in the same section, the act speaks of a person who "*did* inhabit and cultivate *at the time of passing this act*, and still *continues* to inhabit and cultivate" at the time of making a subsequent application.

So, in Sec. 2, of the act of February 5, 1813, "where it shall appear that any person who *has* delivered his notice of claim, *is* entitled;" where *has* and *is* clearly have a future meaning. 2 Stat., 797.

So in section 2, of the act of April 29, 1816, the terms "*shall be* settled," and "*are* settled," are used as synonymous, both of them referring to future periods. 3 Stat., 330.

Finally, by the act of May 24, 1824, certain persons were allowed pre-emption rights, and authorized therewith to enter any unimproved tracts within the Lawrence Land District, "the sale of which *is* authorized by law." Here is the precise phrase, and the act itself interprets it; for it provides that the tracts selected shall be bounded by the sectional or divisional lines run OR TO BE RUN, under the direction, &c., and also that the entry must be made at least two weeks before the adjacent lands are offered for sale. So that the expression "*is* authorized by law," included lands that had then not even been surveyed. 4 Stat., 39.

Instances could be multiplied indefinitely of the use in the Statutes of the words *is*, *has*, *have*, in a future sense. Mr. Wirt could not have read any book without finding them so used. It is very likely that he so used them himself. We

all preach better doctrine than we practice; at any rate, better writers than he have made such use of the present tense legitimate.

But this act of May 24, 1824, is of more importance. For it contains a *definition* of the meaning of the phrase. The pre-emption claimant, it said, may enter any unimproved tract, *the sale of which is authorized by law;* and yet he could take lands that were yet to be surveyed. The important word *is* occurred also in that act, in a future sense. The claimant, it says, shall deliver a notice, stating that he was entitled to a pre-emption right, and designating the quarter section he *is* desirous to enter. And when it shall be proven, that any person who *has* delivered such notice was entitled, &c.

Nothing is more common than the use of the present tense with a future meaning. Acts of Congress are not, in general, very accurately drafted; and do not always observe all the proprieties of language. Sometimes, indeed, they have shown great contempt for the constituted authorities on English grammar. Our old legislators were too much oppressed with the gravity of the matters pressing upon their attention, to study with great precision the niceties of language. But in this use of the present tense they were right.

For example, in the Articles of Confederation, we find, in article 7, the word *receives* used in reference to the future; "*is* to be entered into," in article 6; and in the same, "and the danger *is* so imminent;" "war *has been* declared," in Article 7; "when land forces *are* raised;" followed by such forces *shall be* raised," and "the State which first *made* the appointment."

So, in the Constitution itself, Article 3, Section 3, "such inferior officers as they *think* proper."

But it certainly is unnecessary to multiply instances of such use of the present tense. For, after all, all the difficulties presented by the phrase "*is authorized* by law" disappeared, when it was decided, in Stoddard *vs.* Chambers, 2

Howard, 284, that if a New Madrid entry had been made, or the patent issued, after the reservation of the land from sale ceased on the 16th of May, 1829, the title under it could not have been contested. The same decision was made in Barry *vs.* Gamble, 3 Howard, 32; Bissell *vs.* Penrose, 8 Howard, 317; and Mills *vs.* Stoddard, 8 Howard, 345.

And yet Secretary Stuart, after all these cases had been decided, reiterated, in 1851, to defeat Rector's claims, the absurd notion of Mr. Wirt.

When Matthew Cunningham, in 1838, applied to enter a quarter section of land that was part of the town of Little Rock, he was confronted by the New Madrid claims of Peter Porier and Eloi Dejarlois, which were located in 1820, the Quapaw title to the land having been extinguished in 1818; and the reply to his application by the Commissioner of the General Land Office, on the 1st of February, 1838, was, that the tract was located by these claims, and that the act of March 2, 1827, (4 Stat., 219,) *had confirmed the locations.*

They were illegal, on account of excess of quantity, which was the only defect *intended* to be cured by that act. And it followed that, in February, 1838, that officer considered that the objection of the existence of the Quapaw title in 1815 was no longer tenable; but was removed by the act of 1827, the general words used in that act including all locations, as, indeed, in terms, they did; and if that was the case, the location of the Langlois claim also was then confirmed.

The Commissioner said that, as these locations were only *voidable* and not *void*, on the 25th of December, 1824, Cunningham could not then legally enter the land with a Cherokee pre-emption; *i. e.,* that the removal in 1827 of the objection of excess of quantity, would relate, so as to make the location valid *ab initio*, and cut out an intervening location of a pre-emption. If so, it would have equally passed around and to the rear of a reservation of the same land from sale or entry.

On appeal to the Attorney General, that magistrate decided on the 5th of April, 1838, that the act of 1827 did confirm the locations, and as Cunningham had not then taken the necessary steps to complete his entry, the rights of the New Madrid claimants became fixed as against him.

In that case Cunningham applied for a hearing of his claim, after the impediments in his way should have been removed; and the Attorney General decided against him, because he *had* not done acts which he *could* not do, until after the department should have annulled the New Madrid claims which they then held valid. That has been the approved mode of destroying rights, by the administration of department law. This Court, in Cunningham *vs.* Ashley & Beebe, 14 Howard, 377, nevertheless decreed his claim valid, and gave him the land.

On the 11th of June, 1838, the Commissioner of the General Land Office reiterated his decision, that the New Madrid locations were cured by the act of 1827. That act provided, "That the location of lands heretofore made according to law," by virtue of warrants issued under the New Madrid Act, not exceeding 640 acres in the whole, to any one sufferer, should be perfected into grants in the manner prescribed by that act, any construction thereof to the contrary notwithstanding.

And, as the *only* objection then remaining to the Langlois location, was the untenable and frivolous one that the Quapaw title had not been extinguished in 1815, the act of 1827 *did*, in express terms, confirm it. It was a location "theretofore made according to law." If there was, at any time, any valid objection to it, all, valid and invalid, had been cured; and therefore, since the act of 1827, at any rate, the perfect title to the Hot Springs has been unjustly withheld from Rector upon a quibble.

In the opinion of Mr. Attorney General Cushing, in regard to the claims to these Springs, he said: "Many years ago it was ruled, by Mr. Wirt, that the words in an act of

Congress authorizing pre-emption of lands, 'the sale of which is authorized by law,' excluded the right of pre-emption from all lands, the sale of which had not been authorized by law *at the date of the pre-emption act*. Mr. Wirt's decision was right in the given case; but the reason was unsound, at least if intended as affirming that, as a general proposition, the words in an act, 'the sale of which *is* authorized by law,' confine the inquiry to the question, whether the sale was authorized or not *at the date of the act*.

"I do not entertain the least doubt that a New Madrid location, made on lands the sale of which was authorized at the time of the location, would be a good location, whatever might have been the condition of the lands at the time of the New Madrid Act."

In general doctrine, he said, the word *is* had reference, not to the date of the law, but to the date of the thing to be done under it. The decision of this Court in Barry *vs.* Gamble, 3 Howard, 32, 54, was that a New Madrid location might be made on lands not surveyed or proclaimed; and the act of 1843 removed all difficulty arising from occupancy of the Indians.

As Congress did not expect the parties to whom it offered benefits, to wait until the public surveys should have been made over a portion of the country, before they should be allowed to give up their injured land, and take land elsewhere in lieu of it, so neither did it mean by the phrase "land, the sale of which is authorized by law," either land that had been *offered* at public sale, and which consequently one could purchase at private sale; or land that the President had directed or might direct, by proclamation, to be offered for sale; or land surveyed and ready to be offered for sale, or even land ordered to be surveyed that it *might* be directed to be sold; but simply land, the sale of which was not *contrary* to the law, and which the law authorized to be at the time surveyed and sold.

For if it did not mean just this, and no more—if it meant

either of the others, there was not a foot of land in Missouri Territory, the sale of which was authorized by law, until 1823. There is no middle ground between the two meanings—land which a man can go *now*, at this moment, and buy at private sale at Government price, at the Government Land Office, or land which is by law the subject of sale, is not forbidden to be sold, and *may* be surveyed and sold. Whenever any one has halted somewhere between these two meanings, and tried to find some intermediate point at which the sale of lands which one could not as yet purchase, was "authorized by law," he has but guessed at random, without being able to give, or even attempting to give, a reason for his conclusion. It never occurred to the officers of the executive departments, in their wanderings in search of the meaning of the phrase, that when the act of the 18th May, 1796, used the phrases "the lands *by this act directed* to be sold," "townships which by the said ordinance are *directed* to be sold," "nothing in this act shall *authorize* the sale," "the President of the United States is *hereby* authorized to grant a patent;" and the act of 10th May, 1800, the phrases "*directed to be* sold by the act" of 1796, "*hereby directed* to be sold," "by the above mentioned act directed to be sold," &c., &c., they *settled* the meaning of the phrase, "sale of which is authorized by law;" and that the *authorization* was "*by law*," and contained in the words "shall sell," "may sell," "shall be offered for sale at public vendue," in the same acts; and that *those acts* "authorized the sale" of *all* lands which they did not declare reserved for the *future* disposal of the United States.

THE ACT OF MARCH 1, 1843.

When the act of 1822 provided that the locations theretofore made of New Madrid warrants should be perfected into grants, although they had not conformed to the sectional or

quarter-sectional lines of the public surveys, the limitation, "if made in pursuance of the provisions of that act in other respects" was added: and the objection made by Mr. Wirt was deemed to remain unremoved, that if the sectional lines had not been run, when the location was made, the sale of the lands was not authorized by law, and therefore the location had *not* been "made in pursuance of the provisions" of the New Madrid Act, in *that* other respect.

And three years afterwards the other objection was interposed, that no location could be valid that had been made on land, the sale of which was not authorized by law, for any reason, on the 17th of February, 1815, and therefore none made upon lands that were in 1818 ceded to the United States by the Quapaw Treaty.

When that of March 2d, 1827, provided that the locations of lands theretofore made "according to law" by virtue of New Madrid warrants, not exceeding 640 acres in the whole to any one sufferer, should be perfected into grants, the objections remained that the Langlois location had been made in a square on lands the sectional lines whereof had not been run, wherefore their sale was not then authorized by law, and the location was therefore made without authority of law, and was void; and that the Quapaw title to such lands not having been extinguished on the 17th of February, 1815, therefore the sale of those lands was not *then* authorized by law, and even after the extinguishment of the Quapaw title, location upon them could not lawfully be made; and therefore the location of Langlois' warrant was not "made according to law."

And when the act of March 1, 1843, provided that the location of New Madrid warrants on land south of the Arkansas River, should be perfected into grants, in like manner as if the Indian title to such lands had been completely extinguished on the 17th of February, 1815, the same limitation was interposed, "if made in pursuance of the provisions of that act in other respects"; and it was held that only the

single objection of the existence of the Indian title at the date of the passage of the New Madrid Act was removed, and that if for any other cause the sale of the lands was not authorized by law when the New Madrid Act was passed, or when the location was made, the act of 1843 did not remove such other cause of nullity. So that the objection remained, that when the location was made the sectional lines had not been run, and therefore the sale of the lands was not then authorized by law, although the Indian title had then been extinguished; wherefore the Langlois location was *not* "made in pursuance of the provisions" of the New Madrid Act, in that other respect.

In other words, that the effect of the act was only this, that if a location was made on lands the sale of which was then authorized by law, after the Quapaw treaty of 1818, it was not an objection to it that the Quapaw title had not been extinguished on the 17th of February, 1815; but if when the location was made the sectional lines had not been run, the sale of the land was not then authorized by law, the location was not made in pursuance of the provisions of the act, and the act of 1843 did not cure that vice.

And if there was any *other* reason, independent of the supposed Indian title, on the 17th of February, 1815, why the sale of the land in question was not *then* authorized by law, that would have made the location of land after that reason had ceased to exist, and when the sale of the land *was* authorized by law, as invalid as if the sale of it had been still not authorized.

But *omne majus in se continet minus;* and as the land *could not* be surveyvd, nor its survey directed, so long as the Indian title to it had not been extinguished, the removal of the objection that that title had not been extinguished, included the removal of the objection that the land had neither been surveyed nor directed to be surveyed. For it would have been idle to remove the principal cause, nor *could* it be

removed, without removal thereby of its necessary consequences.

The single objection that remained, therefore, after the passage of the act of 1843, that ever had been taken to the location of 1820, was, that when the location was made, the land had neither been surveyed nor directed to be surveyed, and therefore the sale of it was not then authorized by law. To this there are two answers :

1st. That the sale of the lands adjacent to the Hot Springs *was* then authorized by law, for the law had authorized it to be surveyed and sold, and it was in no manner reserved or forbidden to be sold.

2d. That if the objection had been a valid one at first, it was removed by the act of 1822, which confirmed all locations to which the only objection was that they had not conformed to the lines of the public surveys, without making any distinction between those made on lands already surveyed, and those made on lands not surveyed ; and the acts of grace and bounties of the Republic are not to be narrowed by strict construction ; unless, at least, there be some weighty reason for it, not permitting the belief that the Legislature meant to extend its beneficence to certain cases.

Mr. Attorney General Cushing said, in his opinion in regard to the claims to the Hot Springs, (6 Opin. of the Attos. Gen., 700,) that the case of Stoddard *vs.* Chambers, 2 Howard, 284, disposed of this claim, if there was no survey and location by Rector until after the passage of the act of 1832 ; but that otherwise it did not ; for that was a case of a *location* made on lands reserved, and by no means decides that a valid location made prior to the act of 1832, was expropriated by that act, or that it prevented the consummation of such previously acquired appropriation.

It is true, as Mr. Cushing said, (Id., 703,) that the act of 1843 does not in the least degree affect this claim : For that act cured no defect but one, *i. e.*, the *supposed* defect of non-

single objection of the existence of the Indian title at the date of the passage of the New Madrid Act was removed, and that if for any other cause the sale of the lands was not authorized by law when the New Madrid Act was passed, or when the location was made, the act of 1843 did not remove such other cause of nullity. So that the objection remained, that when the location was made the sectional lines had not been run, and therefore the sale of the lands was not then authorized by law, although the Indian title had then been extinguished; wherefore the Langlois location was *not* "made in pursuance of the provisions" of the New Madrid Act, in that other respect.

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It is true, as Mr. Cushing said, (Id., 703,) that the act of 1843 does not in the least degree affect this claim : For that act cured no defect but one, *i. e.*, the *supposed* defect of non-

extinguishment, *at the time of the passage of the New Madrid act*, of the Indian title to the lands south of the Arkansas.

For this New Madrid claim was not located until after the Indian title had been extinguished, wherefore the objection which had until 1843 prevented its perfection into title, was futile all the time, and no remedial act was really necessary to remove it.

The act of 1843, applying it to this claim, enacts that if the location in 1820 would have been valid in case the Indian title had been extinguished before the 17th of February, 1815, then it shall be perfected into a grant.

What, in that case, would have made it invalid? Not the fact that the Surveyor General had not sent the plat and notice required by the New Madrid act, to the Recorder of Land Titles; for the officer of the Government, whose subordinate he was, by positive instructions, and decisions never yet reversed by the Treasury or Interior Department, prevented him from doing it, by emphatic and reiterated prohibition. In omni causâ, pro facto accipitur id, in quo per alium mora fit quominus fiat.—Pomponius: L. 39. ff. de div. reg. jur. Dig. 50, 17, 39.

Nor the fact that in 1820 the lands had not been surveyed, nor directed to be surveyed, and that so their sale was not authorized by law.

There was no other objection. If there was no other valid objection than that the Indian title was not extinguished in 1815, the law said, the location shall be perfected into a grant.

But, it is now said, this would, directly or by indirection repeal the reservation contained in the act of 1832; but that reservation, being by a special law, and of four particular sections of land, a general law, to cure an objection of all New Madrid locations, and pre-emptions under the act of 1814, south of the River Arkansas, cannot operate a repeal by implication, of the former special law.

And in support of this, the decision of this Court, in The United States *vs.* Gear, 3 Howard, 120, is relied on.

We do not dispute the maxim of the Roman Law, Lex specialis per generalem non abrogatur: and we think that the act of 1843 did *not* repeal the reservation of 1832, in favor of the pre-emption claims. Before the decision of this Court in the case of Frisbie *vs.* Whitney, 9 Wallace, 187, we thought otherwise.

Nor do we contend that the act of 1843 repealed the reservation, as to the New Madrid claim. We claim that the reservation never affected it; and that this act simply left it as it stood before the reservation, declining longer to rely on an objection never entitled to respect.

What *is* the *reservation* in the act of 1832? If the United States then *owned* this land, it could, of course, decline to sell it or allow it to be located with any grant or claim. A man may refuse to sell what is his own. If Rector's location had then been really invalid, the United States would still have owned the land, and it could have been *reserved* by them. But if the New Madrid location was really valid, and the only remaining objection to it was nought, the United States, not having it to sell, could not reserve it from sale.

If the only objection to the location of 1820 that remained when that of the existence of the Indian title in 1815 had been removed, was merely futile, the effect of the act of 1843, as to this claim, was merely to remove an obstacle unjustly and illegally interposed. It was not to *make* a title good, so that the party might assert it; but to remove that which illegally prevented the assertion of a good title. Rector does not seek either to enter or locate the land, nor ask that it be now appropriated. It was located and appropriated in 1820.

But what is the meaning of the expression that land is *reserved* for the future disposal of the United States? Precisely that which is meant by an individual, who, owning an

article of property, and not caring to part with it, says, *not binding himself by any promise or obligation to any one*,—says to *himself*, resolves, and declares that he will not sell the article until he may see fit to do so. He does not mean that a previous sale or a bargain for one shall be cancelled, but that he will make no new one. The United States do not declare an intention to disregard rights or equities existing, to annul entries or locations, or to destroy anything that has been done, but they merely declare that, until they shall see fit to do it they will not sell, and that because they will not sell, no one shall enter the land, nor take it by location of any floating claim or grant or right; nor shall any other than the same legislative power *appropriate* it for any purpose whatever.

Now it must be clear that a declaration like this *could* not stand in the way of the removal of an obstacle unjustly interposed, to prevent or delay the obtaining a patent upon a good and valid location made long before. Whether the act of 1843 was general or special, it unquestionably removed that obstacle as to *all* cases. None are excepted. The *effect* of the removal in a given case is another question.

So, the United States say, we will not at present sell these lands, and nobody shall enter or locate them. Afterwards they say, it shall no longer be an objection to any claim or location, that the Indian title was not extinguished in 1815. The obstacle never was valid, and the location of the lands *was* valid, and its perfection only prevented by this invalid objection. Can the prior determination not to sell nor permit entry or location for a time, destroy the validity of the prior location, by preventing, as to this land and location, the removal of the obstacle? And, if the obstacle *is* removed as to *it*, how can the determination not to sell, invalidate or prevent the grant of patent on a prior valid location, when the only objection has disappeared?

Perhaps this, also, is worth considering,—that Congress is presumed to have known, in 1843, that the Springs had been

reserved by the act of 1832. Yet, notwithstanding this knowledge, the act of 1843 did not *except* locations on lands that had been reserved from sale, or on the Hot Springs specifically, though it did except such as had been sold and appropriated. Here was a fit case in which to apply the rules, *Exclusio unius, inclusio alterius*, and *Expressio unius, exclusio alterius;* because here the reason that dictated them applies with all its force; for if it meant also to exclude locations on lands reserved, or one particular location, or a particular reservation, the same right to locate elsewhere should in justice have been given, and undoubtedly would have been given, as was given to those whose locations had been sold.

The reservation was, of course, subject to all just prior claims to any part of the lands. That is so, *of course*, because legislation is never held, if it can be helped by the *courts*, at least, to be rascality; and because when the United States said, "We will not sell this land for a time, and no one shall enter, locate, or appropriate it," they did not add, "and we annul all legal or equitable claims to it." When A. says, "I will not sell my house or horse, and my agents shall not dispose of either, until I shall direct it," he cannot be considered, or held, or *construed* to say, by implication, "and I repudiate all claims of title to it and declare them null."

Mr. Attorney General Cushing said (6 Opin., 700,) that the words "shall be reserved" did not necessarily imply any resuming, taking back, annulling, or repudiation of that which had before been lawfully entered, located, or appropriated. It would have been more worthily put, to have said that the words in question *could* not be made to imply any thing of the kind, because they mean nothing of the kind. He said: "We are not *bound* to suppose that Congress intended a violent invasion of a private right and interest, in any portion of the land described, and lawfully acquired under previous laws; for such an act would be an *apparent* disregard of the Constitution of the United States."

That, too, is very delicately put. He should have said, as Lord Coke would have done: "We have no *right* to suppose any such thing, to impute any such villainous intention to Congress; for such an act would not only be an open violation and contempt of the Constitution, but such an outrage upon private rights of property as cannot be tolerated in any free government."

But the same learned magistrate well said that the case of Stoddard *vs.* Chambers, (2 Howard, 284,) did not dispose of this case, if there was a location by survey prior to 1832, for that that case was of a location made on lands then reserved, and did by no means decide that a valid prior location was annulled by the act of 1832, *or that that act prevented the consummation of the previously acquired appropriation.*

And he said, truly, that the act of 1832 shows that Congress understood the land of the Hot Springs to be unappropriated public domain. The presumption is so, in favor of the Legislature; for if it did not so understand, common honesty and decency required that the title to it, though imperfect, should be respected. Of course it follows that Congress did not intend to strike down and destroy any claim whatever. It did not say so; and no officer of the Government ever had a right to say so for it. And this, we suppose, was what Mr. Cushing meant by saying that, as Congress had no reason to suppose that there was any valid claim to the Hot Springs, "so it may well be that Congress shall have passed an act which, *in terms*, is incompatible even with any previous inchoate appropriation of the Hot Springs." That is, the act *may* be so worded as to bear that construction, as Congress knew of no valid claims; but nevertheless it must be held not to have been the intention to cut off and annul such claims, if any, unknown to it, existed.

But what this magistrate did broadly admit (p. 702) was this: *That if the non-extinguishment of the Indian title was the only flaw in this case, then the opinion of his predecessor,*

Mr. Attorney General Johnson, that Rector was entitled to the land by virtue of the act of 1843, *was well founded.* Well, that *was* the only flaw, supposing it to have been a flaw at all—*i. e.*, supposing that the Indian title existing in 1815, made illegal the location of 1820. Even if it did, says Mr. Johnson, the act of 1843 confirms his claim to this land, notwithstanding the reservation.

And Mr. Cushing proceeds to say (p. 703) that the act of 1843 in nowise affects Rector, because he made his location after the Indian title was extinguished, and therefore, if he made it before 1832, there was no flaw or defect to cure, growing out of the Indian title.

But the act of 1843 did, in one sense, *affect* him, in a very great degree. The law officers and secretaries of the Government had held against him, from 1825 to 1843, that his location was invalid, because the Indian title was not extinguished on the 17th of February, 1815. This objection had all the time prevented his perfecting his location into a grant. The act of 1843 swept away that objection—effaced it, annulled it, made it never to have existed, as to effect on his claim, and said, your location shall be perfected into a grant, *in like manner* as if the Indian title *had* been extinguished on the 17th of February, 1815.

But what Mr. Cushing there said, was upon the hypothesis there was no location of the Langlois claim prior to the act of 1832.

The opinion of Mr. Attorney General Johnson will be found in 5 Opinions of Attos. Gen., 236, 237.

On the 7th of December, 1841, Mr. Attorney General Legaré considered the effect of the act of July 4, 1836, confirming claims to land in the State of Missouri (5 Stat., 126,) and held that this act was "a legislative confirmation of all voidable locations made under any law of the United States, or sale by the United States, of any description whatever." (3 Ops. of Attos. Gen., 720.) He said: "I see no restrictions in the act; and since its very object is, as I have shown,

to give validity to these sales and locations, in spite of one fatal objection, (that the land subject to these claims were not *in commercio*,) *I see no reason why it should not be interpreted as curing all other defects* which are susceptible of being cured by an act of Congress."

And he held that this act did cure defects in locations of New Madrid claims, though made on lands not subject to sale—lands, for instance, not surveyed, or lands expressly reserved from sale. "In short," he said, "sales or locations which, under the general land laws, would be held void by the Executive Department of the Government, are simply *voidable* in regard to Congress, and may, at any time, be rendered valid by its acts, *provided only*, as in the case before me, *is has done nothing that amounts to a complete alienation to others*."

Wherefore he held such New Madrid locations valid against French or Spanish claims, confirmed by the act of 1836, although these New Madrid locations were upon lands that had been expressly reserved from sale by the act of 3d March, 1811.

Mr. Legaré said: "The exception in the act of 1836, section 2, is of lands previously located under any law of the United States, or surveyed or sold by the United States." (To these the confirmations were not to give title.) "In the act of 1824 the words are still more comprehensive. They cover all locations made, (to which there exists not some incurable objection, distinct from these claims. * * * * *) and all sales susceptible of confirmation by an act of Congress." The words of the act of May 26, 1824, were as to cases in which the confirmee was only to be allowed to enter *other* lands, "If, in any case, it should so happen that the lands, tenements, or hereditaments, decreed to any claimant, under the provisions of this act, *shall have been sold by the United States, or otherwise disposed of, or if the same shall have been heretofore located.*" 4 Stat., 52, § 11.

"To say," Mr. Legaré continued, "that this exception

does not protect those whose locations cover the lands subject to the claims confirmed by these acts, because those lands had been reserved in the act of 1811, section 6, and were not subject to location or sale, is to make the exception a solecism in terms. It would be to except what was not excepted, which were absurd; and so the argument proves too much. If 'location made under law' mean lawful locations, and 'sales' mean valid sales, there could be none such, according to this showing itself, on lands reserved by a permanent act from sale or location."

Here there was a law (of 1811) specially reserving from sale lands to which title was claimed by French or Spanish concession. The act of 1824 protects against such claims, lands that had previously been sold or otherwise disposed of, or located, and this, the Attorney General held, gave the locator title, though the land located by him was still, by the act of 1811, reserved from sale. Of course this was because the act of Congress *confirmed* the locations, and made them valid, by relation, as if the lands had never been reserved from sale.

Rector holds the certificate of the Recorder of Land Titles, upon which the New Madrid Act provided that a patent should issue; and we do not by any means admit that it was not regularly and properly issued. After the survey or resurvey ordered by the Surveyor General of Arkansas had been made, in 1838, a plat of that survey, with a proper notice, was returned by the Surveyor General to the Recorder of Land Titles, and he issued his final certificate thereupon.

It was decided by the Attorney General, finally, that this survey, then supposed to have been the first and only one, was invalid, because it was the location of the claim, and that location could not be made, after the reservation of the land from entry and location, in 1832. And, if it *had* been the

location, there was a better reason, to wit, the limitation contained in the act of 1822, which prevented the location of warrants after the 26th of April, 1823.

But a vast number of *surveys* were made after that date, where the applications, *called by the law* "locations," had been filed with the Surveyor General before that date; in all which cases patents issued, clearly on the ground that whenever the survey was made, it *related* to the date of the application.

Whether, if no previous survey had been made, one could have been effectually made, eighteen years after the application had been filed, and six years after the land had been reserved from entry, location or appropriation, for the future disposal of the United States, we need not inquire. Perhaps, after so great a lapse of time the law might infer abandonment; and, perhaps, the doctrine settled in regard to pre-emption rights would apply to such a case.

But in this case the survey of 1838 was valid as a resurvey, and in accordance with the rules and practice of the General Land Office. If Mr. Wirt's decisions had not prevented sending the plat and notice to the Recorder, still they *might* not have been sent until the survey of 1838 had been made: because the custom was to withhold the plat of a private claim, until the adjacent lands were surveyed, and a corrected plat would be sent up, showing the connection of the private survey with the public surveys, and to the end that the patent might not issue until, by the public surveys, the Surveyor General could know whether the survey of the private claim covered any part of a sixteenth section, reserved for the use of schools.

On the 6th of March, 1816, the Commissioner of the General Land Office, instructing the Surveyor General, said:

"Private claims on lands, covered by these surveys, must be surveyed at the same time with the public lands, and a *connected plat*, or plats, of the whole, transmitted to this Office, and to the Land Office at St. Louis."—Instr. & Opin., 802.

But we do not think that this was intended to prevent sending to the Recorder the plats of survey of private claims, as soon as they were made out; for it was evidently the special object of the practice directed, to furnish the *selling* offices and the General Land Office with the means of knowing what subdivisions of the public lands according to the public surveys could not be sold, because covered by private claims. No lands so covered, even with incomplete claims, were lands the sale of which was authorized by law.

But it did certainly make it necessary to *re*survey all such claims, *all* private claims, whether they had been surveyed under the French, Spanish or American Government; and undoubtedly these resurveys were meant to be the retracing and establishing, if it could be done, of the old lines. And if that could not be done, because they had been effaced, or if it *was* done without that reason, then the patent for the private claim necessarily referred to the resurvey, though varying from the first, because otherwise the fractions would be all wrong; and the very object of the resurvey was to prevent that. So also, the first survey might, for some cause, have been inaccurate as to courses and distances; and in that case also the second survey would govern: and, *as* necessarily, it would have relation to the time of the first survey; for otherwise the party would suffer by the inaccuracies and errors of the first surveyor.

Undoubtedly, the survey ordered by Surveyor General Cross was *intended* to correspond with the original survey. He had no right to have it made otherwise. On the 25th of September, 1826, George Graham, Commissioner, writing to the Surveyor General at Washington, Mississippi, said, in regard to French and Spanish claims in Louisiana: "All that the Surveyor can now do, is to take care that the resurvey is in strict conformity to the calls, artificial and natural, of the original survey, as confirmed. . . . A resurvey in all these cases was unnecessary, except for the purpose of ascertaining the adjacent public lands. It there-

fore was to be made at the public expense, and should have been made in conformity to the old survey. . . . In all cases where the old re-surveys substantially cover the land intended to be confirmed, a trivial deviation in such old surveys from the Spanish survey, either as to course and distance, or as to quantity, should not be considered as sufficient ground for disapproval."—Instr. & Opin., 860.

On the 30th of January, 1827, the same Commissioner wrote to the same officer: "The instructions given by you . . . are approved, except so far as they intimate the propriety of not recording the field-notes and surveys of private claims, until the plats and maps are ready to be returned to the proper offices. I doubt the propriety of such instruction. Private surveys were made fifteen or twenty years ago, the Township plats containing which have not yet been returned. There certainly ought to be some record of the surveys, and it is for recording them that a compensation is allowed to the deputy. . . .

" . . . The object of re-surveys is not so much to correct or alter boundaries heretofore established and officially confirmed, as to correct the quantities contained in such boundaries. There may be cases, however, where the boundaries should be corrected; but this should, for the most part, be done through judicial decisions."—Instr. & Opin., 862.

In a letter of April 4, 1827, from the same officer to the Surveyor General at St. Louis, in regard to resurveys of private claims, he said that it would "be at the option of the claimant to take a patent in conformity to the resurvey, if unobjectionable to the Government, or to take a patent founded on the old Spanish survey;" in which latter case they would be driven to proof of their boundaries in every case of dispute. "The granting of a patent," he said, "on a resurvey of this description of confirmed claims, is an act of courtesy on the part of the Government;" and that, if the party did not choose to have his patent in accordance

with the resurvey, he had no right to demand one that should relieve him of the necessity of proving his boundaries.—Instr. & Opin., 869, 870.

A diagram showing the two surveys is at page 325 of the printed record. It will be seen that the north and south lines of the two are the same; but the east and west lines are somewhat farther to the westward, in Hale's survey, than in that of 1820; the older survey better complying with the application of location, which selected the 200 arpents in a square, with the Hot Springs in the centre.

It seems to us that Rector had the right to claim a patent under either survey,—at least as against the Government. Almost any right may be annihilated by technicalities and carping squibbles and the dissection of words and phrases of the laws; but all such defeats of just rights are but acts of spoliation, disguised by very thin and flimsy garmenting. The French call such small exploits of the lawyer—intellect *Ergoteries*, and *Petitesses de chicane*.

The system of surveying public lands is from east to west.

The Hot Springs are in township 2 south, range 19 west. The magnetic attraction in township 2 south, range 17 west, known as Magnet Cove Township, prevented the subdivision of that township in the ordinary way by compass.

By special contract it was surveyed in 1837 by flags, starting outside of this magnetic influence.

This impediment delayed the sectionizing of Hot Spring township; Magnet Cove township being east, had to be surveyed first.

And according to the custom of the office, so long as those adjoining lands remained unsurveyed, no plat and notice of the Langlois location would have been sent to the office of the Recorder. Exhibit or Schedule F shows this; for it shows that returns to the Recorder were in a great number

of cases made after the year 1840, some, in fact, twenty years later.

We cannot conceive, therefore, of any possible reason why, if the transmission of the plat and notice *had been* indispensable to the completion of the location, and the Surveyors General had delayed to send it up, until the making of the public surveys, the intervening reservation should prevent its being done, when the location had been resurveyed in connection with the public surveys: nor why Rector has not the right to a patent by virtue of his certificate.

In the case of Rector *vs.* Gaines, 19 Ark., 86, the Supreme Court of Arkansas said: "The true question on the point is, not what is a location in general, or what is in general the proper signification of that word; but what is the location contemplated by the New Madrid act?"

And so this Court has thought, and has considered that the transmission of the plat and notice to the Recorder of Land Titles was part of the process of location, without which being done, the location was not complete.

It is not to be *presumed* that the Legislature, in writing the word "location" intended to give it a new meaning. If it has it, in the New Madrid Act, it must be because the intention to that effect is plain. That it has no new meaning there seems to us plain, from the phrases used there, "a plat of each location," and "a notice in writing designating the tract located;" for these make the plat and notice the official evidence of a location that has become complete.

By the general law and system, the Surveyor General had three plats made of each survey. One went from his office to the Register of the proper Land Office, for him to make sales by; one went to the Commissioner of the General Land Office; and one remained in the office of the Surveyor General, and was recorded. When the Surveyor General, in cases under the New Madrid Act, sent the plat and notice to the Recorder, that corresponded to the one sent to the Register,—and at the same time he sent one to the Com-

missioner; which he could not have done, if the location had not been complete.

By the act of March 2d, 1807, when the Commissioners had made final decision in favor of a claimant, they were required to send to the Secretary of the Treasury and to the Surveyor General transcripts of their decision, and to deliver to the claimant a certificate, that he was entitled to a patent. Undoubtedly that act was final; and yet the claimant was required to file that certificate with the proper Register or Recorder, within twelve months after date; and, a plat being previously filed with or transmitted to him by the Surveyor, the Recorder was required to issue *his* certificate *in favor of the party*, on which he would obtain a patent.

If filing the certificate of the Commissioners, under this law, and the plat, with the Recorder was not necessary to a complete *confirmation*, then filing the first certificate and the plat and notice, under the New Madrid Act was not necessary to a complete *location*.

And, if the Surveyor General *was* to give a certificate, stating the circumstance of the case, and that the party *was entitled to a patent*, then the decisions of this Court have proceeded on a misconception, which the act of 1807, if it had ever been brought to its notice would have prevented.

The acts are in pari materiâ. The former act enables us to read the latter correctly. Their language is the same.

One reads; "and they shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated."

And the other; "and shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated."

One reads: "which certificate shall be filed with the proper Register or Recorder, within twelve months after date."

The other: "which certificate shall be filed with the said Recorder, within twelve months after date.

One reads: "and the Register and Recorder shall thereupon . . . . issue a certificate in favor of the party, which certificate being transmitted to the Secretary of the Treasury, shall entitle the party to a patent, to be issued in like manner, &c."

The other: "and the Recorder shall thereupon issue a certificate in favor of the party; which certificate being transmitted to the Commissioner of the General Land Office, shall entitle the party to a patent, to be issued in like manner, &c."

Land offices for the disposal of the public lands were created in the Northwest Territory, by act of 10 May, 1800, (2 Stat., 73), each to be under the direction of an officer, to be called The Register of the Land Office. To each, before the days appointed for commencing sales, general plats of lands directed to be sold were to be transmitted by the Surveyor General, who was required also to forward copies of the same to the Secretary of the Treasury. To a person desiring to purchase, the Register was required to give, if he required it, a copy of *the description of the tract*, and a copy *of the plat of the same*, or either of them; and all sales were required to be noted "in the book of surveys or original plat transmitted to them."

By the act of 26 March, 1804, (2 Stat., 277), for the disposal of lands in the Indiana Territory, every purchaser was required to pay the Deputy Surveyor a certain price per mile for surveying, before the latter should deliver to him *a copy of the plat of such tract, stating its contents.* And where all the lines of a tract had not been run, and the contents ascertained, by the Surveyor General, the Register was not to give a final certificate to the purchaser, unless he lodged with the Register a plat of the tract certified by the surveyor.

It was also the duty of the Register to send by mail to the Register of the Treasury the final certificate granted by him to a purchaser; on receiving which the latter officer was to procure and return to him the patent.

By the act of 27 March, 1804, in regard to lands south of Tennessee, (2 Stat., 303), persons claiming lands under British or Spanish grants, or under a prior act of Congress (of 3d March, 1803), were required, as they were by that prior act, to give notice of their claim to the Register of the Land Office, and have their original grant or patent, with the warrant or order of survey, and plat, recorded by him, depositing with him also, all their subsequent deeds.

After Louisiana had been divided into the Territory of Orleans and the district of Louisiana, the act of 2d March, 1805, (2 Stat., 324), created the office of *Register* for the Territory, and that of Recorder of Land Titles of the District, and the claimants of lands were required to file notices of their claims with the Register or Recorder, *i. e.*, with the Register, if in the Territory of Orleans; with the Recorder, if in the District of Louisiana; and to have their grants, warrants or orders of survey, and plats recorded.

It is evident that the officer appointed for the District of Louisiana (Upper Louisiana,) was called Recorder of Land Titles, and appointed instead of a Register, *because it was not intended that he should have anything to do with the sales of the public lands.* His duties, at first, were only to receive and record the titles to lands claimed by French and Spanish concessions, orders of survey, &c.; and most of that business was taken away from him, by the act of 28 February, 1806.

The act of 15 February, 1811, repealed by that of 3 March, 1811, provided for a Land Office for the disposal of lands in the *Territory of Louisiana*, (afterwards Missouri Territory), to be kept at such place as the President should direct; and for the appointment of a Register and Receiver. This provision was re-enacted by section 9 of the latter act. 2 Stat., 617, 662.

By act of 17 February, 1818, four Land Offices were established in Missouri Territory, *in addition to that before established at St. Louis;* and power was given to the President to open them and to appoint Registers and Receivers. 3 Stat., 406.

The Recorder of Land Titles never had anything to do with selling the public lands, or with the public surveys. He recorded the titles of French and Spanish grants, performed at a later day the functions of the Board of Commissioners whose offices had expired, and executed the duties imposed on him by the New Madrid Act. And the plats of survey of New Madrid locations went to him precisely for the reason that the public surveys not having been commenced, each sufferer had the right to locate his claim as he pleased. If he had had to wait, and locate according to the lines of the public surveys, the office of the Register at St. Louis would have been opened, and in most cases no survey would be needed, but only specifications of subdivisions, making up the number of acres, and these would have gone to the Registers, to be marked on their plats, and not to the Recorder.

If the French or Spanish claimant had had his land surveyed before the cession, he had to file his warrant, concession or order of survey, and his plat, with a notice setting forth his title, with the Recorder, to be recorded by him. But this was no part of the process of *location.*

If he had not had it surveyed, or it needed to be resurveyed, it was surveyed or resurveyed by the Surveyor of the United States, and a plat of that survey had to be filed with the Recorder, to serve the same purpose as the French or Spanish survey in other cases. Its filing was no part of the process of location.

One of these claimants, losing his land by earthquake, went through a like process again. He proved the injury and obtained certificate of right to locate so much land. That was the equivalent of his original concession. As he

had procured a survey under his concession, so he now procured one, by written application, by virtue of his certificate. When it was made, and returned to the principal office of surveys, his location was complete. Then it was the duty of the Surveyor General to send a plat of it, and a notice of the location, to the office of the Recorder of Land Titles, and a plat to the General Land Office, precisely as he sent plats of the general surveys to the Registers and to the Commissioner of the General Land Office. And the transmission by him of the plat and notice to the Recorder, was no part of the process of location. It was the official notification, by one officer to another, that the location had been made; and could be sent at any time; but the Surveyor General was required at once to give to the locator a certificate that he was entitled to a patent, filing which with the Recorder of Land Titles he could obtain the certificate from him, on which a patent would issue.

The single possible reason for thinking that the transmission by the Principal Deputy Surveyor to the Recorder of Land Titles, of a plat of the location made, and a notice designating the tract located, was an essential part of the process of location, is that until these were so transmitted, the Recorder could not issue his certificate, entitling the locator to a patent.

But under the act of 1807, (the model of this part of the New Madrid Act,) when the Board of Commissioners had made a *final* decision in favor of a *concessionaire*, which, by the 4th section of that act (2 Stat., 441), was "final against the United States, any act of Congress to the contrary notwithstanding;" and when it had sent transcripts of this decision to the Secretary of the Treasury and to the Surveyor General or officer acting as such; and when it had given the *concessionaire* a certificate, stating the circumstances, and that he was entitled to a patent, and he had filed that with the Recorder of Land Titles, still the Recorder could not give *his* certificate "in favor of the party," until the officer

acting as Surveyor General, having surveyed or re-surveyed the tract, had transmitted to him a plat; and this, not only when *no* plat had already been filed with and recorded by him; but when one *had* been, of an original survey, "duly executed," under the French, Spanish, or American Government, when the Commissioners had thought it necessary to order a re-survey.

The learned counsel for the heirs of Belding has presented his objections to the New Madrid location, and we reply briefly to them, as follows:

The decision of Mr. Wirt that claims under the New Madrid Act were not assignable, was wrong when made, never regarded in practice, for most of the claims were assigned, and was not adhered to by the Government. The rights of assignees are recognized by the acts of the 26th of April, 1822, and March 1, 1843; and assignees have been always deemed to be the legal representatives of the parties.

Instructions and Opinions, 2, 3, 83, 395, 740, 5, 741.
Galt *vs.* Galloway, 4 Peters, 339.
Lessee of French *vs.* Spencer, 21 Howard, 226.

To the objection that the Surveyor General did not order the survey made by Conway, we reply:

That it is proven to have been ordered, by the affidavit of Milburn, and the depositions of John R. and Frederick R. Conway.—Record, 325, 343, 344.

If a copy of the application to locate was made out by the Surveyor General and delivered to the Deputy Surveyor, that was of itself sufficient authority to govern him in making the survey.—Deposition of Frederick R. Conway. Record, 344.

There is abundant proof that such orders were never recorded. A French or Spanish claimant could have his con-

cession surveyed without any order at all. No orders of survey are found, in most of the New Madrid cases.

The survey having been made and returned, and recognized as made by due authority, by the Surveyor General, his direction to make it is presumed; and if he had given none, his acceptance of the survey retroacted, and was equivalent to a mandate.

There was no necessity for a written order.

As to the discrepancy of dates of location and survey: The application for survey was commonly called the location. This was dated the 27th of January, 1819. The survey was dated July 16, 1820, and *thus* the day of his return was the date of the location.

The act of March, 1807, forbidding settlements on lands ceded to the United States had no application to New Madrid locations. They were not *settlements*. And these laws making it a traspass to settle on public land, always enacted and re-enacted, were always a dead letter; for those who cultivated them were too numerous to be dealt with as trespassers, and were continually rewarded with pre-emptions.

As to the important discovery that the certificate to Langlois is dated November 26, 1818, and the assignment below it, January 4, 1818, "ten (10) months and ten (10) days *before* the certificate was issued!" no doubt the learned counsel has often, during the first few days of the new year, by mistake, written the figures of the old year. Nothing is more common.

The power of attorney from Langlois to Story was not recorded, because it was not necessary to record it. The learned counsel is very well aware—no man better—that such powers were common during many years. There were hundreds of them given by settlers on lands ceded to the Cherokees and Choctaws, that had constituted counties in Arkansas, under the act of 1828; and nobody dreamed of recording them. To *record* even a deed gives it no additional validity against the seller. The power given Story author-

ized him to receive the certificate, and it passed by assignment when he sold it.

The subsequent conveyances were taken at different times, to perfect the titles or for greater precaution; because there were many cases in which scoundrels procured original beneficiaries to convey to them lands located under their claims by other parties, their assignees, thus putting those to cost, trouble, and vexation, who were in honest good faith owners of the land, fairly sold for fair prices by the original claimants, easily persuaded afterwards to sell themselves to the devil for small sums, by making formal conveyances to knaves, of what they had once sold and no longer had right to.

The learned counsel seems to have been unconscious that he was arguing the cause before a Court of Equity. The points which he made would better suit another forum, where the practices of Courts of Equity are not regarded.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING.
Of Counsel for Rector.

Supreme Court of the United States.

TERM OF 1875-'6.

No.

THE HOT SPRINGS CASES.

JOHN M. RUSSELL

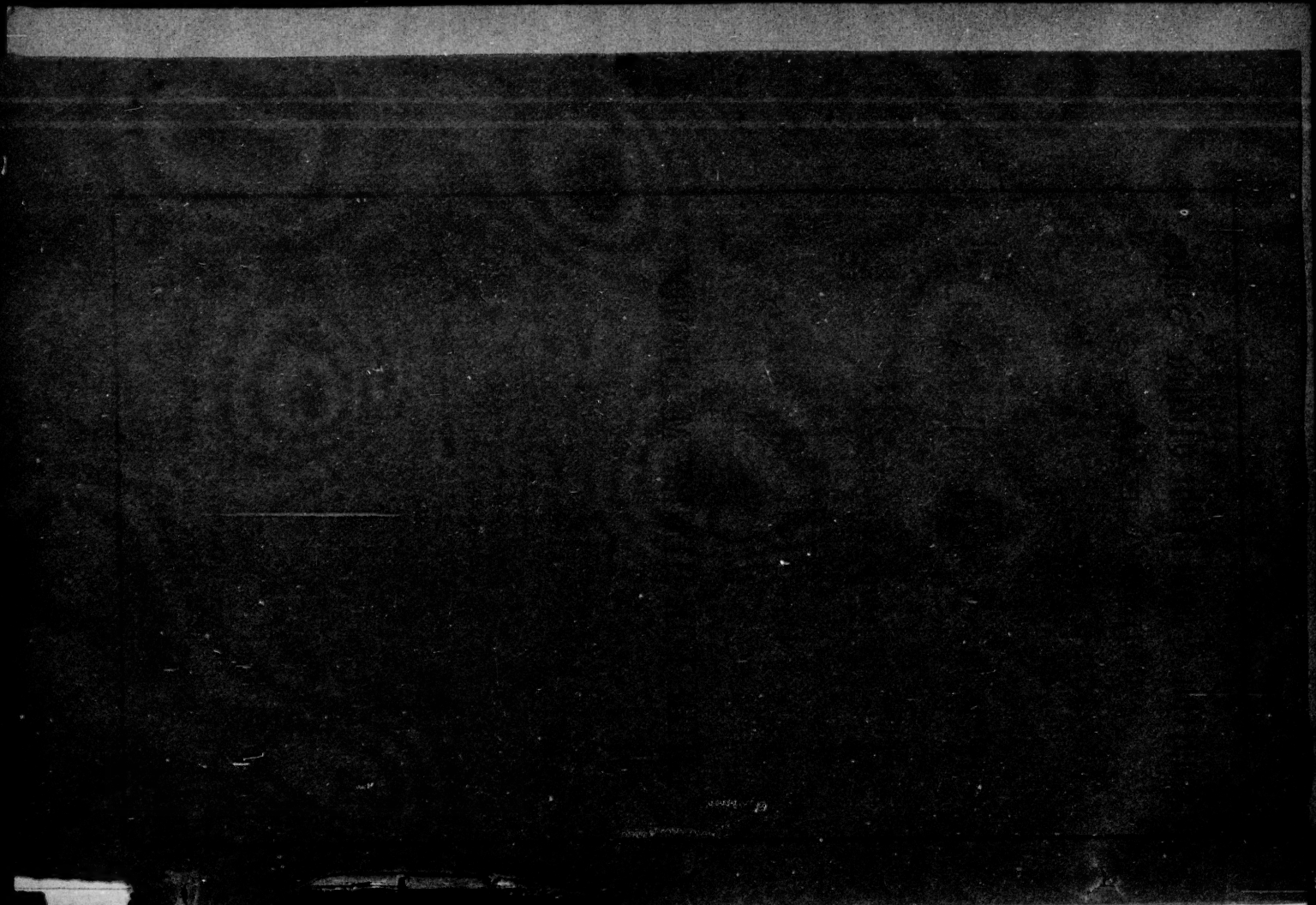
vs.

THE UNITED STATES AND OTHERS.

BRIEF FOR HENRY M. RECTOR.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.

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No. .

THE HOT SPRINGS CASES.

JOHN M. RUSSELL

vs.

THE UNITED STATES AND OTHERS.

BRIEF FOR HENRY M. RECTOR.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.

In the Supreme Court of the United States.

No.

JOHN H. RUSSELL

vs.

THE UNITED STATES AND HENRY M. RECTOR.

BRIEF FOR RECTOR.

THE CASE ON THE PLEADINGS.

By his petition and amended petition, Russell states the principal facts that establish Rector's title, and alleges that by virtue of a deed from Rector to himself, dated on the 5th day of March, 1867, Rector conveyed to him all his right and title to the land located by Hammond and Rector in 1820, and that he "is now, by virtue thereof, *entitled to and sole owner of said land.*"

Record: 40, 43.

And he sets out in his pleading, and produces in evidence, a deed of the date alleged, by which, for the consideration of ten thousand dollars in hand paid, Rector bargained, sold, and quit-claimed to him the land surveyed under certificate 467 to Francis Langlois; not warranting any title, but giving the deed as a quit-claim.

This conveyance, dated March 5, 1867, was witnessed by E. Rector and Thomas H. Walker, acknowledged on the same day, at Pulaski county, Arkansas, and recorded in Hot Spring county on the 7th of March, 1867.

Record: 500.

By supplemental petition filed on the first day of July, 1873, in accordance with the novel mode of pleading in Equity adopted by the Court of Claims in these cases, Rector, protesting that the Court had no jurisdiction of Russell's case, for answer to his petition and amended petition, admitted the execution and delivery of the conveyance relied on by Russell, and stated that on the same day of its making and delivery, Russell made his counter-instrument of writing under seal, whereby, reciting the deed to himself, he further recited that Rector desired to repurchase all the land, except [as to one-half of] that in dispute between himself and the Heirs of Belding, and Hale, and having so repurchased, had that day paid him $5,000, the receipt of which was acknowledged; wherefore Russell thereby pretended to sell, grant and quit-claim to Rector all the land except such one-half, and he and Russell were to remain joint owners of the land so in litigation: and that then the said instrument continued thus:

"Provided, that within twenty days after the adjournment of the first session of the present (Fortieth) Congress, I shall have secured and shall bring and produce to the said Rector a confirmation entire, full and complete, by the Congress of the United States of the title of said Francis Langlois in and to said land, as named in said certificate, numbered 467, as above indicated; but in case I should fail to secure and bring and produce such confirmation of title by the Congress as aforesaid, *then I am to have no claim whatever in and to any of said land*, as named in certificate, numbered 467, *and the said deed from the said Rector to me of this date is to be null and void, and wholly inoperative.*"

A copy of this instrument was exhibited as part of this supplemental petition. It was witnessed by E. W. Rector and Thomas H. Walker, on the day of its date, and recorded in Hot Springs county on the same day with the other deed.

And Rector averred that the Court had no jurisdiction

of the claim of Russell, that the contract between him and Russell was one which the Court would not enforce, if he had obtained confirmation of the claim from Congress; and that he utterly failed to obtain it; and so he pleaded the defeasance in bar, and relied on it by way of answer.

Record: 85, ff.

Required to answer to this matter in avoidance, Russell girded up his loins, and did so with amazing effrontery, by supplemental petition sworn to on the 2d of July. He was *advised* "that Rector *asserts a claim* to the land so conveyed by him" to Russell; but, he *swore*, "your petitioner avers that *said pretended conveyance* WAS A SEPARATE AND DISTINCT TRANSACTION, WHOLLY UNCONNECTED *with the transaction*" of Rector's deed to him; and given without consideration, and void, and he re-affirmed the allegations of his original and amended petitions.

Record: 91.

THE CASE IN PROOF.

Chiefly to know upon what ground he ventured upon these audaciously false statements, swearing that they were true in substance and in fact, we made him a witness, to prove that he executed this conveyance to Rector: and he proved to be quite as extraordinary a witness as respondent. He looked at the original, and *thought* that the signature was his. But, he swore, "there is so much interlining and erasing, that it is far different from the instrument referred to in my supplemental petition." But he had not executed and delivered any *other* instrument to Rector, concerning the Hot Springs. He did not know, when he executed it, that the erasures and interlineations existed. He did not notice any; and if there had been any, he would have noticed them. He would not more positively swear they were not on the paper when he signed it; but could say that he

never knew that he saw them before, until the last month. He never noticed them until within the last month, but could not say that he admitted that they might have been there, but he did not see them.

Record: 516, ff.

A. H. Garland, a lawyer and now the Governor of Arkansas, wrote this conveyance. Russell and Rector came to him to get it done. It is wholly in his handwriting. There are four interlineations: and they were put in in the presence of Rector and Russell, because in drawing the deed he misunderstood them as to the property covered. On reading the deed to them, his attention was called to this, and the three first were inserted, to specify more particularly the parts of Rector's claim, and a deed referred to. The fourth consisted of the words "as aforesaid," referring to the 40th Congress.

From that time, he never saw the deed again.

Record: 519, ff.

Elias W. Rector was present when both instruments were signed, and saw them signed, and witnessed each. The whole of Russell's deed, interlineations included, is in Garland's handwriting. The instruments were executed and acknowledged in Russell's room, in the hotel, at Little Rock.

Record: 509, ff.

THE LAW OF THE CASE.

1.

The Court of Claims has disposed of this case as follows:

"This deed recites the conveyance by Rector, and acknowledges that Rector has that day paid him $5,000, in consideration of which he conveys to Rector all the lands except one-half, as to which half they are to remain joint owners,

'*provided that, within twenty days after the adjournment of the first session of the present Fortieth Congress, I shall have secured and shall bring and produce to the said Rector, a confirmation, entire, full, and complete, by the Congress of the United States, of the title of said Francis Langlois; but that, in case I should fail to secure, and bring and produce, such confirmation of title by the said Congress as aforesaid, then I am to have no claim whatever in and to said land as named in certificate No.* 467, *and the said deed from said Rector to me of this date is to be null and void.*' The Court finds, from extrinsic evidence, that these instruments were executed and exchanged at one and the same time, and were parts of one and the same transaction."

2.

The bargain between the parties, as shown by these papers, was that Russell was to have half of so much of Rector's location as was in the quarter-section claimed by Hale and the heirs of Belding, if he should succeed in inducing Congress to confirm the location absolutely, during the 40th Congress. Failing in this, he was to have no interest. He paid a bond for $1,000, to obtain this contract, making no stipulation for repayment in case of failure. In addition, he paid a small sum in the way of cost and expenses.

Suppl. Petition: Record, 85.
Test. of E. W. Rector: Record, 510.

3.

The arrangement was but a device, to give a semblance of legality to a bargain not enforceable by law. All the reckless swearing in the world cannot disconnect the two papers; and how Russell could dare to swear as he has, it is difficult to comprehend. It is even more difficult to realize that we have descended to that moral state and condition that such a spectacle does not provoke the indignation

of a court of justice, nor even call forth a word of comment.

> Nullane perjuri capitis, fraudisque nefandæ
> Pœna erit? . . . Aspice quantâ
> Voce neget; quæ sit ficti constantia vultûs.

4.

Very curious, also, is the peculiar use to which the learned counsel of Russell puts the well-settled principle that courts of justice will not enforce such bargains as that which his client made for himself with Rector; but will hold them null and void; applying it in such manner as, if he could succeed, to *secure* to Russell, although he failed, what the law would not have permitted him to have if he had succeeded and *earned* by that success that which was to be the price and reward of success.

The deed from Russell, he is of opinion, was a nullity. No money was paid by Rector to Russell. But, the nominal consideration of Rector's deed to Russell being $10,000, of which he paid only $1,000, the nominal consideration of the pretended reconveyance of half the land, $5,000, did not *need* to be paid. It was compensated by so much of the $10,000.

"This agreement was based upon a promise by Russell to secure legislation." *What* agreement? That of Russell that if he failed to do so, the conveyance to him should be void, and he should have no interest in the land? No: Rector's agreement that he should have half the land if he succeeded in procuring the legislation. That this agreement was put into the shape of an absolute conveyance did not make it valid. And if it had been valid, his failure cancelled the whole.

5.

Russell had no conditional estate. The arrangement was wholly executory. He had, said the counsel, "an estate

subject to defeat by a condition subsequent, a condition that was impossible at the time of making it." What was the condition? His failure to procure confirmation by Congress. *That* was not impossible. But, says the learned counsel, Russell *could not* control Congress, and Langlois being dead, his title could not be perfected. There are such persons as legal representatives; and people *do* procure legislation. The condition that Russell should procure it was not *impossible*. If it had been, the deed to him would be, if that were possible, even *more* invalid. Procuring the legislation was the condition of his title; and he wholly failed.

6.

Undoubtedly, a condition relied on to work a forfeiture, is to be construed with great strictness: and in the case cited from 4 Cushing, 178, where, if the grantee *neglected* or *refused* to keep up a fence, he was to forfeit the land, the Court held that a previous demand, notice or request was implied, and that without *refusal* in terms, or *neglect* after notice, there was no forfeiture.

So it has been holden in New York, that conditions which destroy an estate are taken strictly, and a forfeiture should not prevail, upon doubtful constructions of evidence.

Hogeboom *vs.* Hall, 24 Wend., 146.

7.

But here these two instruments, are in law one. The deed to Russell is but a quit-claim, and the provision that Russell should have no claim to possession or rents, until he should have obtained confirmation of the claim, is enough of itself to show the character of the transaction. The whole is but an agreement; and as Russell was content to give a thousand dollars for the privilege of making it, (dog-cheap, too, if he could have had the claim confirmed,)

and saw fit to agree that the deed to him should be void, and he should have no interest in the claim, if he failed to procure confirmation, it is rather a queer proposition that he ought to have the whole of the land, because it was not a lawful condition that if he failed to get the claim confirmed, he should have none of it. The learned counsel sturdily refuses to see that the consideration for which he was to have an interest was that he should procure a confirmation from Congress, which he admits was contrary to public policy. His notion is that Rector sold him the claim, for $10,000, of which $1,000 was paid, and that the independent stipulation was that if he did not do what it was unlawful to do, he should forfeit the land, even if he had paid the $10,000. But how could he be bound to obtain the confirmation if to do so was not at least a part of the consideration for the conveyance to him?

8.

But why argue gravely against propositions that disturb one's gravity? It is true that if the bargain is, "If I secure the legislation, you shall pay so much," it is null: but if it is, "If I do *not* secure the legislation your agreement to pay me shall be void," that is not null. If I can agree that if I fail to do a *lawful* thing, a conveyance or promise shall be void, because the consideration of it is that the lawful thing is to be done; certainly an agreement that if I fail to do an *unlawful* thing it shall be void, is not less valid.

9.

The technical principles of the law of realty and covenants have nothing to do with this case. It is here in Equity. To urge it as a serious proposition that the deed of Russell was made *subsequently* to the other, and *therefore* such and such consequences follow, lacks little of being absurd. Technically, every reconveyance by way of mortgage, is subsequent to the principal conveyance. In every case, the

title must, technically, vest in the purchaser, before he can reconvey to the vendor, or convey to a third person, by way of mortgage, to secure payment of the credited purchase money.

10.

And every such mortgage, according to the argument of the learned counsel herein, is a conveyance to divest a vested estate, on a contingency: and *therefore*—

11.

If part of the consideration of a deed is immoral or contrary to public policy, or otherwise vicious, it taints and vitiates the whole. That part of the consideration for the conveyance to Russell was a bond of $1,000, does not cure the vice of the rest and a hundred times larger part of the consideration, which was vicious, reprobated by the law, and, as it turned out, illusory. If Russell had succeeded, Rector would have abided by his bargain. He does not rely on its invalidity now. *We* speak of that because the learned Counsel has himself raised the question. *Our* ground is, that it was stipulated and agreed, by the deed of defeasance, that if he failed he should have no interest in the land, and the deed should be inoperative: *and that he did fail*, and the deed to him became blank paper.

12.

It is deemed to be hard that Russell should lose his $1,000. Why? He paid it to induce Rector to make the agreement, by which Russell was to win a huge prize if he succeeded in what he undertook. If he *had* succeeded, and Rector had then refused to abide by the contract, alleging its illegality, there would be some reason for requiring a return of the money. But he paid it for permission to *make* and *enter into* a contract. He has had all he paid it for, all he

bargained for. He failed to procure the act of Congress, and so, having no claim at all under his contract, he lost his money. It is no new thing for a man so to contract as that he may forfeit money on failure to perform.

13.

When the two papers are looked at, it will be seen that the second is *more* than a mere defeasance. If Russell had succeeded, and could have held any part of the land, he would have held it under the re-conveyance, or second conveyance *only*.

14.

If Mr. Russell *has* given the claim six years of labor, he has *not* benefited Rector by it, because he did not procure the confirmation by Congress. If there was no lawful consideration for the payment of the $1,000, let him sue for it. "This honest demand for his rights," is a phrase misapplied. He has no rights, under his contract. He is not a child. He made such a bargain as suited him, and paid a bonus, taking the chances of failure. He failed: and when he afterwards swore that he had an existing and valid conveyance of the claim, and was sole owner of it, and that his own deed was wholly disconnected with the transaction evidenced by Rector's, a separate and distinct transaction, it was a very appropriate mode of sustaining so "honest" a demand. We do not propose to crucify him. He has crucified himself. We do not seek to intimidate him. That which would intimidate most men has had no terrors for him. He has feared neither God nor the law.

The testimony of Mollere, Spicer, and Ellsworth, to prove that after the time fixed in the deed had expired, Rector told Russell to go on, and the contract should stand good, could not keep the conveyance by Rector alive; and the testimony is incompetent and irrelevant, because Russell has

not alleged any such agreement. He claims *title* to all Rector's claim by a deed, which is shown by his own deed to have ceased to be of any effect. And he utterly failed, at last.

And that proof just as little relieves him of the responsibility for his reckless allegations in his supplemental petition as to his deed.

Harrington proves that Rector was willing to abide by the contract if Russell would employ certain counsel. He was to pay him a certain fee down, and a certain larger fee when the case should be disposed of. It doest appear that he employed the counsel, or paid him any fee, or agreed to pay him any fee, and the probability is that he did neither.

We hoped not to be compelled to speak *here* of the case that this claimant has made against himself; but he would have it otherwise. If there is anything in the propositions presented by his counsel, they did not need to be sustained by the means to which the client has resorted; and what he has so recklessly sworn, he has needlessly and uselessly sworn. He cannot say, juravi lingua, mentem injuratam gero.

PIKE & JOHNSON,
SANBORN & KING,
Of Counsel for Rector.

Supreme Court of the United States.

JOHN C. HALE, APPELLANT,
vs.
THE UNITED STATES.

No. 692.

Brief in behalf of the Appellant.

This appeal from the Court of Claims is consolidated with that of Henry M. Rector, No. 646, and that of the heirs of Belding, No. 772. These cases have been adjudicated by the court below, and are brought into this court on appeal, by virtue of the act of Congress of May 31, 1870, entitled "An act in relation to the Hot Springs reservation in Arkansas," which is printed in full at pages 10 and 11 of the transcript.

Of the three titles or claims, that of Hale is the oldest, being founded on a right of pre-emption, claimed by one John Percifull under the act of April 12, 1814.

3 Statutes-at-Large, p. 122–'3.

The Rector title is founded on a New Madrid location, claimed to have been made in the year 1820.

The Belding title, claimed by Gaines and others, is founded on the pre-emption act of May 29, 1830, (4 Stats. L., p. 420,) and upon an entry of the land made December 19, 1851, by virtue of an equivocal order of the Secretary

of the Interior, but since vacated and annulled by the same authority.

The Pleadings and Issues.

The pleadings in these cases are not formal. They consist merely of the usual petition in the Court of Claims and the general answer of the Government.

In the Hale case the question as to the validity of the settlement in 1814 was decided against the claimant; and this is assigned as a fundamental error in the decree of the court below.

The act of April 20, 1832, (4 Stat. L., 505,) reserves from sale the Hot Springs tract, including the land in dispute. It is insisted that the act of March 1, 1843, (5 Stat. L., p. 603,) entitled "An act to perfect the titles to land south of the Arkansas river, held under New Madrid locations and pre-emption rights under the act of 1814," repeals the reservation act of 1832. The Court of Claims denied this construction; and this, also, is claimed to be erroneous.

By the order consolidating these cases, (transcript, p. 79,) the several claimants were required, by amended petitions, to assert their respective rights as against each other, which was done accordingly. Hale's claims in this respect will appear in the sequel of this argument.

The Hale title, which now vests in the widow and heirs of John C. Hale, deceased, was acquired by conveyance from Sarah Percifull, the widow, and David Percifull, the sole heir of John Percifull, the original settler. (See transcript, pp. 131 to 135.) Pre-emption rights were assignable under the early laws. Assignments of these rights were first prohibited, I believe, by the third section of the act of May 29, 1830, and the prohibition extended only to pre-emptions under that act. The sale of a pre-

emption right is recognized as valid in Thredgill *vs.* Pintard, (12 How., 24.)

John Percifull settled on the land in controversy as early as 1808 or 1809, and continued to hold and occupy it, by himself and his tenants, until his death in 1836. His widow and son continued the occupation after his death until they assigned to Hale; and the possession has been held by Hale and his heirs to the present time.

At the time of the enactment of the pre-emption law of April 12, 1814, the land in question, embracing the Hot Springs, was in the Territory of Missouri. (See the acts of March 26, 1804, 2 Stat. L., p. 237, and of June 4, 1812, *id.*, p. 743.) The county of Arkansas, in the Missouri Territory, was organized on the 31st December, 1813. (Geyer's Digest, p. 133.) Arkansas Territory was established by the act of March 2, 1819.

3 Stat. L., 493.

Although, in 1814, the land in dispute was comprised within one of the organized counties of the Territory of Missouri, and although numerous white settlers had occupied the lands, yet this part of the Territory was not surveyed and subdivided until the year 1838. Prior to this survey, the settler could not make proof of his right of pre-emption, nor apply to enter the land he claimed. But the want of surveys was no obstacle to settlements and pre-emptions, for the act of February 5, 1813, (2 Stat. L., p. 797,) which is made part of the pre-emption act of 1814, especially refers to the "sectional and divisional lines *run or to be run*," and evidently contemplated settlements on unsurveyed as well as surveyed lands.

See letter of the Commissioner of Public Lands, December 5, 1855, transcript, p. 167.

In 1838, after the land had been surveyed, and before it had been offered for sale, the widow and heir of Percifull made application to pre-empt and enter the land at the land office in Washington, Arkansas. The proof made at the time is in the transcript, pp. 97 to 104. The register and receiver rejected the claim on the ground that part of the land had "been located by New Madrid certificate No. 467, in the name of Francis Langlois."

In 1843, the application was renewed and again rejected for the reasons given by the register and receiver in their decision of November 10, 1843.

Transcript, pp. 105, 106.

Finally, on the 23d October, 1850, on the application of all the claimants, the register and receiver were instructed by the Commissioner of the General Land Office to examine and adjudicate the rights of the several parties, and to return the testimony to the General Land Office. (Transcript, pp. 156, 157.) The additional evidence produced by Hale on this occasion is found in the transcript, pp. 108 to 136. But it seems that the register and receiver did not allow to Hale the reasonable and necessary time to procure the testimony of some of his material witnesses, and even refused to hear them when produced. (See statement and affidavits, transcript, pp. 145 to 153.) The result of this investigation was a disagreement on the part of the register and receiver, the latter deciding in favor of Hale's claim, and the former against it. The opinions of these officers are given at length in the transcript, pp. 136 to 145.

From the time of these proceedings in 1851, the several claimants have been struggling to assert their respective rights in the General Land Office and in the courts. Hale has taken the precaution to perpetuate the testimony of some of his witnesses by appropriate legal proceedings in

the courts of Arkansas, (transcript, pp. 219 to 265,) and some depositions have been regularly taken in this cause under the authority of the Court of Claims. Thus all the testimony which could be procured after so great a lapse of time is now presented to the court; and it is believed to be amply sufficient to establish the fact that John Percifull "inhabited and cultivated" the tract of land in controversy, so as to entitle him to a right of pre-emption under the act of April 12, 1814.

This fact, however, is denied by the opposing claimants; and it seems not to be admitted by the learned judge who delivered the opinion of the Court of Claims. It becomes necessary, therefore, to refer briefly to the testimony on this point; for, if the claimant fails to prove inhabitancy and cultivation, as required by the act of 1814, the very foundation of his title is swept away, and the possession of more than sixty years, held by himself and those under whom he claims, will prove utterly unavailing.

Inhabitancy and Cultivation by Percifull.

The proofs made by Percifull's widow and son in 1838, and again in 1843, would undoubtedly have secured a pre-emption under ordinary circumstances. (Transcript, pp. 97 to 106.) Thousands of pre-emptions have been established on similar testimony—equally informal and simple statements of unlettered but truthful men. It is a significant fact that in neither case do the register and receiver reject the claim on account of insufficient evidence of inhabitancy and cultivation. In both instances, as I understand those officers, they base their rejection on other grounds.

At this time public attention had been attracted to the Hot Springs, and the land in controversy was held to be of

great value. Rector had attempted to appropriate it by his New Madrid certificate in 1820, and Belding, although only a tenant of Percifull's, actually sought to enter it over the head of his landlord, by virtue of his occupation of the land in 1830. The cupidity of rival claimants had become excited, and there was to be henceforward no peace for the old pioneer, who, at the earliest period, had selected this land for his home. His testimony is to be sharply criticized, his witnesses attacked, and his efforts thwarted in every possible way.

But it is well to consider in passing what view the Department took of the case at the time of these earliest proceedings. In the transcript, pp. 106, 107, we have the letter of the Commissioner of the General Land Office of March 1, 1843. This officer here states that "the Percifull claim was decided against on the ground that it is south of the Arkansas river, in a tract of country ceded subsequent to 1814 by the Quapaws," and that if it were not barred by the act of 1832, (of which hereafter,) "it would seem to have precedence" of the other claims. No one at this time appears to have questioned the sufficiency of Percifull's proofs to sustain his right of pre-emption, if other difficulties had not been in the way.

In 1851, when the investigation took place at the local land office, the tripartite controversy was at its very heighth. As already heretofore stated, although much of Hale's most important testimony was excluded, the receiver held that he had satisfactorily established his right under the settlement of John Percifull made in 1814. The register differed in opinion. These two officers also differed in their opinions of the Belding claim, as will hereafter be shown.

The receiver, in his written opinion, gives his view of the testimony at length. (Transcript, pp. 136 to 140.) I refer to this statement as entirely satisfactory and convinc-

ing, even with the imperfect evidence then before the Office. But with the additional testimony in the present record, the case is made still more strong and unanswerable.

Without entering into particulars, or quoting largely from the statements of the witnesses, I refer to the deposition of James Neal, (transcript, pp. 224, 225, and 238, 239,) in which he proves that he was at the Springs in the spring of 1812, and again in the fall of that year, and again in the year 1814; on each of these occasions he found Percifull occupying a house at that place, and having a patch of ground in cultivation.

Adam Stroud (p. 234) proves the inhabitancy and cultivation for the years 1811, 1812, 1813, and 1814. He also says that Percifull was recognized as the head and proprietor of the premises, and took in everybody that called on him. He had in cultivation a small field or patch on the east side of the creek, &c.

Warren Dunham, (p. 99,) Silas Dod, (p. 104,) and Thomas Holman, (pp. 105 and 106,) had very distinctly proved the same facts in the earliest investigations.

All these witnesses, and others, prove that Percifull was universally considered the proprietor of the place. They not only testify to the facts within their personal knowledge, but they give the statements of other persons, made at the time on the spot, *ante litem motam*, and amounting to such reputation of Percifull's right as would be admissible in evidence under the circumstances of this case.

1 Greenleaf's Ev., §§ 129, 130, 131.

A great mass of depositions have been taken (transcript, pp. 167 to 219) to show that all the witnesses mentioned, and others whose names have not been quoted, are dead, many of them long since, even before the investigation of 1851.

Against this testimony, apparently so satisfactory and conclusive, the contesting claimant, Rector, in 1851, introduced one Jacob Barkman to prove that Warren Dunham, then dead, had made statements to him different from those contained in his deposition. Barkman (p. 112) says he had several conversations with Dunham, and continues: "The understanding between me and Dunham was that Percifull never had any claim to said Springs. We considered that Percifull never lived at the Springs until the year 1819." This is very singular, that these two persons should have had an "understanding" about the question of Percifull's claim.

So, also, at p. 111, an attempt is made to discredit the sworn testimony of Thomas Holman by proving that, at some indefinite time, he had made contradictory statements to the witness Hawkins.

Now these efforts to discredit the early witnesses are made in 1851, nearly forty years after the transactions which were the subject of inquiry had taken place, after the witnesses themselves were dead, and when they could not deny these contradictory statements, nor vindicate the truth of the testimony given when they were living, nor make any explanation whatever. Under these circumstances, proof of such contradictory statements is wholly inadmissible.

1 Greenleaf, § 462.

Moreover, Hawkins himself, in 1838, was a witness in favor of the Percifull pre-emption. (P. 103.) He also testifies to the good character and credibility of Holman. (P. 111.) In fact, the good character of all the witnesses for Percifull was established affirmatively at the examination of 1851, because the register and receiver were expressly instructed to inform themselves on that point, and they acted accordingly.

But in addition to this effort to discredit witnesses, a more formidable one is made to prove that Percifull did not live at the Springs in 1814, nor indeed until 1819, and that in fact he did not claim the possession of the place. The depositions of Barkman and Hignight (pp. 115 to 121) are chiefly relied on to establish these positions. They testify that Percifull lived on the Wachita river, some six or eight miles from the Springs, and cultivated a small field at that place; and both state very positively that Percifull did not live at the Springs until 1819.

On this point, they are expressly contradicted by Thos. S. Woodward, who in May, 1816, found Mr. and Mrs. Percifull keeping a boarding-house at the Springs. (P. 127.) They also are contradicted by the five principal witnesses above named, to say nothing of the sworn statement of Mrs. Percifull, and of the son and heir, David Percifull, (pp. 100 to 102.)

But in spite of the positive testimony of Hignight against the claim of Percifull, the truth crops out occasionally in a very significant manner. On being asked how Percifull founded his claim to the Springs, he replies: "The people looked up to him as the proprietor because he furnished there provisions, breadstuffs, and meats, for those who did not want to kill it." (P. 120.) And again, being asked especially as to his claims in the years 1811, '12, and '13, this witness replies: "In consequence of his doing so much for those invalids who came there, Mr. Percifull deemed that he had a claim to the Hot Springs; for he used to furnish those who had no money with provisions, as well as those who had money. And when visitors left there they used to give up to him their camps, &c., considering him the proprietor of the Springs."

Pp. 120, 121.

It cannot be denied that there is a contradiction in the testimony on one side and the other, although the preponderance is greatly in favor of the Percifull claim. But there is also a very obvious way of reconciling the conflicting statements and making them entirely consistent with each other, and with the right of pre-emption claimed in this case.

There is no doubt that Percifull cultivated a little farm on the Ouachita, where he made bread for himself and for the supply of his visitors at the Springs. He probably spent a good portion of his time at the farm, especially as there was very little cultivable land near the Springs. But there is not a syllable of proof that he claimed a pre-emption at the farm. He did claim his pre-emption at the Springs: of this there is abundant proof. His cultivation at the farm was subsidiary to his actual residence and claim at the other more important place. His hunting, also, to supply game and meat to visitors at the Springs, in connection with his making bread on the Ouachita, was the most effectual mode of maintaining and holding his claim to the land at the Springs. Indeed, it was impossible for him to hold it in any other way. He complied with the law by cultivating a small garden on the land in question, while he adopted still more efficient means, and in fact the only efficient means, of establishing his proprietorship on a solid and substantial basis. His efforts in this respect were so well directed and so successful that his claim of proprietorship was universally acknowledged; and even Hignight, while testifying against him, is compelled to admit this controlling and important fact.

Now the explanation is simply this: most of the witnesses saw him at the Springs, knew that he had a house and lived there, and cultivated a garden, as there was very little land fit for cultivation in that immediate vicinity,

while others, who lived remote from the Springs and visited them only occasionally, at intervals of a year or more, (as Barkman and Bonne,) saw him only at the farm on the Ouachita, where he was at work solely for the support of his establishment at the Springs. The seemingly conflicting statements of the witnesses are thus completely reconciled.

I have already referred to the opinion of the Commissioner of the General Land Office in his letter of March 1, 1843, (p. 107,) and I now point to an admission to the same effect in the letter of Commissioner Hendricks of November 27, 1855, (transcript, p. 164.) He says: "It is satisfactorily established that as early as 1810 the said John Percifull was living with his wife Sarah in one or two huts or small houses about from 40 to 60 steps from the Springs, and cultivated a garden or truck-patch about 270 yards from the Springs, and were still residing there in 1814 and 1816, but had added nothing to the improvements."

Not only did the Government, in 1843 and 1855, through the Commissioner of the General Land Office, thus acknowledge the sufficiency of Percifull's settlement at the Hot Springs to entitle him to a pre-emption, if there had been no other obstacle in the way; but I think I may justly claim that both Belding and Rector, through whom the contesting rights asserted here have been derived, have gone even further in the recognition of the Percifull title.

Belding was unquestionably the tenant of Percifull in 1829, as is fully proved by his written acknowledgment of April 2, 1831. (Pp. 152–'3.) At the investigation of 1851 this was satisfactorily established, and was the ground on which the receiver rejected his claim to a pre-emption under the act of 1830. The register thought the fact of his holding as the tenant of another was no obstacle to his claiming a pre-emption by virtue of his possession and cul-

tivation in 1829. The Secretary of the Interior even allowed an entry of the land by the heirs of Belding, although Belding himself, in his lifetime, never asserted such a right, nor set up any claim against the title of his landlord. Notwithstanding this action of the Interior Department, (which, however, was afterwards annulled,) I think I am justified in maintaining that Belding, by leasing the land from Percifull and disclaiming any other right than that of a tenant, did effectually recognize the claim of Percifull to the land in dispute.

So, also, the agreement between Hale and Rector made on the 11th May, 1843, (pp. 235, 236,) would seem to be an acknowledgment, to some extent, of the right of pre-emption claimed by Hale, as derived from the widow and heir of John Percifull, and founded on the old man's inhabitancy and cultivation under the act of 1814. At any rate, these several agreements prove the continued posession of Perciful and those claiming under him, and go far to sustain the universal understanding that Percifull was the proprietor of the Springs, and that his inhabitancy in 1814 was not mythical but actual.

THE INDIAN TITLE, supposed to have been vested in the insignificant tribe of Quapaws prior to the treaty of 1818, has always been put forward as the great obstacle in the way of Percifull's pre-emption claim to the land in question. In the case of Thredgill *vs.* Pintard, above quoted, this court seems to have taken it for granted that the Indians had a possessory right to the lands south of the Arkansas river, merely because they assumed to make the cession of a boundless territory by the second article of that treaty.

The treaty made with France, April 30, 1803, (8 Stat. L., p. 200,) conveyed the Louisiana territory to the United States; and the only provision in that treaty bearing on

this subject is that which requires our Government to respect all treaties which Spain had made with the Indians. But Spain had made no treaties with the Indians, and certainly none with the Quapaws. This court so intimates in Marsh *vs.* Brooks, (14 How., 522) It is well known that Spain authorized settlements in Louisiana territory, and made grants of land there, without the least regard to the existence of any Indian title. The Spanish regulations on this subject are found in Geyer's Digest of the Laws of Missouri. By numerous laws, which it is unnecessary to quote, our own Government has confirmed titles acquired under these regulations, and has granted lands to settlers who had simply occupied the lands in pursuance of the Spanish laws.

Act of March 26, 1804, secs. 14 and 15, 2 Stat. L., p. 289.

Act of March 2, 1805, sec. 2, 2 Stat. L., pp. 325, 326.

Very soon after the treaty with France, our Government passed laws for the organization of the Territories thus acquired. On the 31st October, 1803, the President was authorized to take possession of the Territory. (2 Stat. L., 272.) The laws of the United States had been extended over it. (2 Stat. L., 251.) By the above-mentioned act of March 26, 1804, the whole purchase was organized into two Territories. One, comprising the limits of the present State of Louisiana, was called the Territory of Orleans, afterwards changed to Louisiana; the other, which included the land in controversy, was called the District of Louisiana. The name was afterwards changed to Louisiana Territory. (2 Stat. L., 331.) By the act of June 4, 1812, (2 Stat. L., p. 743,) the name of the Territory was again changed, and it was now organized with a territorial government called Missouri. It was under this organiza-

tion that the county of Arkansas was established in 1813, as above stated.

Geyser's Digest, *ubi sup.*

By these various acts the settlement of that country was encouraged, for the organized governments were intended for the whites, and not for the Indians. And then came the act of April 12, 1814, (3 Stat. L., 122,) which in its 5th section gave to "every person, and the legal representatives of every person who has actually inhabited and cultivated a tract of land lying in that part of the State of Louisiana which composes the late Territory of Orleans or the Territory of Missouri," the right to pre-empt the same to the extent of 160 acres. Now, was this intended to be a deception and a fraud on the settler? Was it not unlimited in its operation over the whole Territory, and was it not in conformity with the very spirit of the pre-existing Spanish laws, which, under the obligations of the treaty with France, our Government had liberally and faithfully administered? There was in the law of 1814 no exception in favor of the Indian title any more than there was in the Spanish laws for the settlement of the Territory. And it is notorious that this pre-emption law was for a long time so understood and so construed by the authorities of our Government. A great number of tracts of land south of the Arkansas, within the limits claimed to have been ceded by the treaty of 1818, have been pre-empted by virtue of the act of 1814, and patents have been issued to the occupants under that act, or to their legal representatives. In fact, this Percifull pre-emption, under which the heirs of Hale now claim, is the only one of a great number south of the Arkansas river which has been finally rejected, as the records of the Land Office will abundantly show. The ob-

jection was never raised until it was suggested in the opinion of Attorney-General Wirt, 3d May, 1836.

See Opinions of Attorneys-General, 1791 to 1838, p. 508.

In view of the general policy of the laws quoted and of the practice under those laws, by which numerous pre-emptions under the act of 1814 have been perfected by patents, I venture to ask this court to reconsider the question involved, if, perchance, any case heretofore decided may be considered as conflicting with the views now presented.

But whatever may be the conclusion of the court as to the Indian title to the lands south of the Arkansas river prior to the treaty of 1818, there can be no doubt, I think, that the obstacle was intended to be wholly removed by the 3d section of the act of March 1, 1843, (5 Stat. L., 603,) entitled "An act to perfect the titles to lands south of the Arkansas river, held under New Madrid locations and pre-emption rights under the act of one thousand eight hundred and fourteen." The language of that section is: "*And be it further enacted*, That every settler on the public lands south of the Arkansas river shall be entitled to the same benefits accruing under the provisions of the pre-emption act of one thousand eight hundred and fourteen as though they had resided north of said river."

It has been universally admitted that this act was intended to remove, and did actually remove, the difficulty arising out of the assumed possessory right of the Quapaw Indians. (See the letters of the Commissioner of the General Land Office, pp. 107 and 165.) And the principle is distinctly asserted by this court in the case of Thredgil *vs.* Pintard, (12 Howard, 37, 38.)

If, therefore, the Indian title had been the only obstacle to Percifull's pre-emption, that would have been effectually removed by that provision of the act of 1843 which has

just been quoted. This difficulty may therefore be considered as entirely out of the way.

THE RESERVATION ACT OF 1832.

The 3d section of the act of April 20, 1832, entitled "An act authorizing the Governor of the Territory of Arkansas to lease the salt springs in said Territory, and for other purposes," is to this effect:

"That the Hot Springs in said Territory, together with four sections of land, including said Springs, as near the centre thereof as may be, shall be reserved for future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever."

It must be admitted that after the passage of this law, until the same was repealed or modified, no officer of the United States had authority to permit the land to be entered; and the decision of Frisbie *vs.* Whitney (9 Wall., 187) would seem to establish the principle that any inchoate right which Percifull may have possessed under the act of 1814 was taken away or suspended by this reservation.

But it is submitted that the act of March 1, 1843, above quoted, operates a repeal of the reservation act of 1832. It was passed for the express purpose of enabling the several claimants of the land at the Hot Springs to assert their rights according to their respective validity and precedence. Its very title implies so much—"An act to *perfect the titles* south of the Arkansas river, held under New Madrid locations, and pre-emption rights under the act of one thousand eight hundred and fourteen." Although Cherokee pre-emptions are not mentioned in the title, yet they are provided for in the 4th section of the act; and the record in this case shows that one of Hale's grounds of

claim was by virtue of a Cherokee pre-emption. In fact, the act of 1843 was intended especially for this Hot Springs case, and this is well known to all the parties to this controversy, and to their counsel, or at least to such of them as have long been engaged in the litigation.

It is a significant and most convincing fact that this pre-emption claim of John Percifull on the land at Hot Springs was the only claim under the act of 1814, existing south of the Arkansas, at the time of the passage of the act of 1843. It was so stated by Hon. Thomas A. Hendricks, Commissioner of the General Land Office, in an official letter, dated January 26, 1859, and printed in 22 Howard's Reports, p. 151. A certified copy of this letter is in the transcript of the record in this case, (p. 268.) If there was no other case of a pre-emption claim under the act of 1814, in the territory south of the Arkansas, at the time when the act of 1843 was passed, then the argument is irresistible that the law was intended for that case, and must be applied to it in spite of the reservation of 1832. No other case has been presented at the Land Office; none other has been known or heard of.

The plain and palpable intention of the 3d section of the act of 1843 was to "*perfect the title*," or to confirm the pre-emption rights south of the Arkansas river, *ab initio;* that is to say, it intended to place the settler in the position he would have occupied if the Indian title had been previously extinguished. That Indian title was the only obstacle at the time of settlement, and the professed object of the law of 1843 was to give full force and effect to the law of 1814, south of the Arkansas, as well as north of it. This could not be done without a repeal of the reservation of 1832.

In a former argument of this case I have made the fol-

lowing references and quotations, which I now again submit to this court:

"'A remedial act shall be so construed as most effectually to meet the end in view and prevent a failure of the remedy.

"'Dwar. Stat., 614.

"'Beneficial statutes, therefore, have always been taken and expounded *ultra* the strict letter, but not, it is well and wisely said, *contra* the letter.

"'*Ibid.*, 623.

"'Every affirmative statute is a repeal of a precedent affirmative statute where its matter necessarily implies a negative, but only so far as it is clearly and indisputably contrary to the former act 'in the very matter,' and the repugnancy such that the two acts cannot be reconciled, for then *leges posteriores priores contrarias abrogant.*

"'*Ibid.*, 530 to 531, and authorities there quoted.

"The enactment of 1843 is, that '*every settler south of the Arkansas shall be entitled.*' John Percifull is one of these settlers, and he is included in the very words of the law, as much so as if the settlers had been enumerated and called by name. The Hot Springs were reserved in 1832, but John Percifull was settled there in 1814. The repugnance of the two laws is in 'the very matter;' they cannot stand together.

"Against this construction have been quoted—

"Wilcox *vs.* Jackson, 13 Pet., 513.

"Gear *vs.* The United States, 3 How., 120.

"Of these the latter alone deserves consideration, having an apparent application to the case in hand.

"In this case a lead mine was claimed by pre-emption, upon the ground that all the lands in a certain district were directed to be sold by a law passed in 1834, which law made some special exceptions, but did not except lead mines. The court held that the general law of 1807, which

reserved all lead mines and salt springs from sale, was operative in the district mentioned, notwithstanding the broad terms of the law of 1834.

"The facts of this case are almost the reverse of those in the case now before this court. The act of 1807 was a general law reserving all salt springs and lead mines, and the policy of that law had been uniformly and consistently maintained in the disposition of all the public lands. On the other hand, the act of 1832 was a special reservation of an isolated, exceptional tract of land, which at the time was already occupied by a settler.

"The act of 1834, in Gear's case, was an act of ordinary legislation, establishing a new district for the sale of lands, apparently not contemplating a departure from the policy prevailing in all other land districts, and only indirectly and inferentially affecting rights of pre-emption, which were not the primary object of the law. On the contrary, again, the act of 1843 was a special act, designed to act retrospectively upon a specified class of settlers, and to confirm a certain number of pre-emptions from their inception in 1814.

"In the Gear case, the law might very reasonably be construed to mean 'all the lands in this district shall be sold, so far as the general policy of the law allows such sales, and no further.' In the present case, it would be necessary to insert in the law words of exception, thus: 'Every settler on the public lands south of the Arkansas river,' except the old pioneer, John Percifull, shall be entitled, &c.; the remedial policy of curing the defects of title under the act of 1814 shall not have its full effect; it shall cure everybody's title except John Percifull's.

"Finally, in the one case, the general reservation was made long before the party had performed any act out of which his claim arose. In the other case, the act of settlement was performed long before the reservation, and the remedial law comes afterwards to recognize the meritorious character of the original act, and to remove an obstacle which prevented its operation at the time. The act of 1843 goes a quarter of a century behind the act of 1832, and legislates with reference to the state of facts known to have existed at that early day.

"There is one general expression in the Gear decision which is thought to cover this case, being a statement of the abstract rule or principle of construction applicable to the facts. It is as follows:

"'The rule is, that a perpetual statute, (which all statutes are unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms on the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the matter legislated upon.'

"It has already been shown that in this case there is 'a section of another act directly bearing in terms on the particular matter of the first act,' inasmuch as the words 'every settler' necessarily comprehend John Percifull, and refer to his settlement on the Hot Springs land. There is not a mere 'implication' raised by the act of 1843 against the reservation of 1832. It is a special and direct contradiction or repugnancy 'in the very matter,' for the reason already stated, viz: that the pre-emption on the Hot Springs tract is as certainly included in the very words, and in the necessary intendment of the law, as if it had been the only settlement south of the Arkansas river in the year 1814."

This reasoning and these citations were made on the supposition that the law of 1843 was a "general law," applying to many cases of pre-emptions under the act of 1814. But it appears that there was actually none other but the one now in question. This fact renders the foregoing argument only the more urgent and unanswerable, or rather, I should be inclined to say, renders it supererogatory and wholly unnecessary. The act of 1843 was intended to "*perfect the title*" to this particular pre-emption claim, the only one to which it was applicable, and this could not be done without repealing the act of 1832.

THE BELDING PRE-EMPTION CLAIM OF GAINES AND OTHERS.

This claim has its origin in the act of 1830, but was lost by the limitation of that act, and was not revived until after the reservation act of 1832. It was not revived by the remedial act of 1843, which did not provide for pre-emptions claimed under the act of 1830. But I leave the argument on these questions to those who are interested to defeat the claim of Belding's heirs.

If, however, this claim should be allowed, I insist that it shall be for the benefit of Hale's heirs, as prayed in the amendments to the original petition. (Transcript, pp. 80 to 83.) Belding's possession in 1829, by virtue of which his heirs have been permitted to make their anomalous entry, was as the tenant of Percifull. This was fully proved at the investigation in 1851, as shown by the following conclusions of the Register of the Land Office:

"1st. That Ludovicus Belding was in possession of the Hot Springs on the 29th day of May, 1830, not, however, in his own right, but as a tenant under and by virtue of a lease from John Percifull, who, it is shown, claimed said Springs, and had possession of them.

"2d. That said Belding did cultivate, or cause it to be done, a portion of the land embraced in the quarter-section in which the Hot Springs are situated, but that he only acquired the right to cultivate said lands by means of said lease from John Perciful to him.

"3d. That all the improvements which said Belding put on said quarter-section during the time he had possession were made in accordance with an express agreement between him and Percifull that he should do so, and was the consideration on which Percifull leased the Springs to him, and the said improvements were made for the use and benefit of said Percifull, and not Belding.

"4th. That the purchase of the Millard houses was made by Belding for the use and benefit of John Percifull,

and not for his own use and benefit no longer than the term of his said lease.

"*And lastly:* For the foregoing reasons, and assuming the position to be correct, in law as well as good conscience, that the possession of the tenant is the possession of the landlord, I do not consider that said Belding was a settler or occupant of the southwest qr. of sec. 33, T. 2 S., R. 19 W., on the 29th day of May, 1830, or that he cultivated land on said quarter-section prior to that time, within the meaning and spirit of the law, and that consequently the heirs and legal representatives of said Belding are not entitled to enter said land by pre-emption under the provisions of the act approved 29th of May, 1830, or any act supplemental thereto."

The register of the land office did not contest these conclusions of the receiver, but considered that Belding's possession entitled him to the pre-emption. (Transcript, pp. 549, 550.) The Secretary of the Interior, considering that both the register and receiver agreed on the fact of possession in 1829, and holding the tenancy of Belding not to be material, authorized the entry by his heirs. But a succeeding Secretary ordered this entry to be annulled. (Transcript, pp. 154, 155.) The parties interested tried to arrest the cancellation of their entry by an injunction, but this court, in Gaines *vs.* Thompson, sustained the act of the Secretary as legal and proper.

7 Wallace, 347.

It would, indeed, be an extraordinary result if, in this case, Percifull's tenant should be allowed to supersede his landlord, and pre-empt the land under the act of 1830. Attorney-General Berrien, in 1830, was of opinion that "the right of pre-emption belongs to the landlord; that a lessee cannot dispute the title of his lessor, and that the possession of the former is to be considered the possession of the

latter, are settled principles of law, founded in justice and policy." A different view was subsequently taken in the Attorney-General's office and the Interior Department, but, it is believed, in opposition to all the authorities on that subject.

Taylor on Landlord and Tenant, § 629.
Williams *vs.* Watkins, 3 Pet., 43.
Lytle *vs.* Arkansas, 22 How., 206.

In the last-mentioned case this court said: "Neither could Cloyes be heard to disavow his landlord's title. He held possession for Ashley, and was subject to be turned out on a month's notice." The same principle is involved in Thredgill *vs.* Pintard, which decided that an assignee could not enter the land in his own right, so as to defeat the claim of the assignor for the purchase-money. And, in addition to this, the 2d section of the act of June 1, 1840, (5 Stat., p. 382,) provides that the landlord, and not the tenant, shall be entitled to the pre-emption. It is true that this enactment had reference to the pre-emption law of 1838, but it is based on the well-settled principles sustained by the authorities quoted, and may well be considered as a legislative construction of those principles as applicable to all cases of pre-emption claims. It was about this time that the contrary principle was asserted in the General Land Office, and the enactment was probably intended to correct an error so serious and unjust.

The Deed to Paxton.

In reference to this paper, the following argument was submitted by Hale's counsel in the supreme court of Arkansas:

"Belding's heirs having no meritorious title themselves, but seeking every means of defeating the title of Percifull's

legal representatives, found in an old record book, in the recorder's office of Clark county, what purports to be a copy of a deed, from Percifull to Paxton, for the Warm Springs, bearing date the 4th of October, 1824. Of this instrument, irregularly registered, they obtained a transcript, and exhibited it with their answer to Hale's bill for the purpose of showing that Percifull had parted with his pre-emption title to the Springs, and that, therefore, Hale had derived no title by purchase from his widow and son. There is no showing in the record that Paxton ever asserted any claim to the Springs under this pretended conveyance, nor is he now doing it, if such a man is in existence; nor do Belding's heirs claim the Springs under any conveyance from him, and if they did it would be as worthless as a deed from one of the Quapaw Indians, who once hunted, perhaps, long years ago, in the forests near the Springs. The instrument bears date the 4th of October, 1824. It was set up and exhibited in the answer of Belding's heirs, filed 20th August, 1860, as an outstanding title in Paxton. Thus a period of nearly thirty-six years had elapsed from the date of this instrument to the time it was asserted in the answer as a defence to the bill; a period over three times as long as the time ever allowed by any statute of limitations in this State or Territory for the bringing of actions for the recovery of the possession of real estate. Hence, if Paxton himself, or any one holding under him by conveyance, had brought an action or a bill in chancery for the recovery of possession of the Springs, at the time Belding's heirs filed their answer to Hale's bill, the suit would have been trebly barred by limitation. There is no evidence in the record that Paxton, or any one claiming under him, was ever in possession of the Springs. On the contrary, from the date of said deed, continuously to the time the answer was interposed, Percifull and those claiming under him, and adversely to Paxton, were in possession of the property. When Belding went to the Springs in February, 1828, to lease the Springs, he did not go to Paxton to obtain the lease, but to Percifull, who was recognized by the whole community as the rightful possessor, and who had lived and cultivated there in the years 1825, 1826, and 1827, as well as previous years, as shown by the deposition of Love-

joy, Irons, and others. And when Belding's lease expired, the possession of the Springs was surrendered to Percifull, and not to Paxton."

It is only necessary to say that it is now over fifty years, instead of thirty-six, since this deed purports to have been executed. During all this time Percifull and those claiming under him have held the land, and no claim has ever been asserted by Paxton or any one else claiming by virtue of the said deed.

The New Madrid Location.

In 1820, when Henry M. Rector made his attempt to locate the Langlois certificate on the land in dispute, Percifull was in possession under his pre-emption claim, and he and his wife were keeping a boarding-house at the Springs. This possession by a *bona fide* settler, under the act of 1814, was a legal obstacle to the location, which probably prevented its completion by the return of the plat and the certificate of the survey to the recorder's office, as required by law.

But the counsel for Hale's heirs does not feel it incumbent on him to enter into the argument on the validity of Rector's attempted location. That gentleman, and his learned counsel, will have sufficient difficulty to make good his case against the Government without opposition from the other claimants.

The court will see, however, that, by the agreement already referred to between Hale and Rector, (transcript, p. 235–6,) Hale is entitled to one-fourth of the land which may be awarded to the said Rector. The amendments to the original petition set up this contract, and pray that it may be enforced between the parties, and that all other suitable relief may be granted. The act of Congress of

May 31, 1870, under which these proceedings were instituted in the Court of Claims, and brought here by appeal, authorizes the courts to "grant all proper relief as between the respective claimants, as well as between each of them and the United States." If the decree of the court below should be reversed, as I think it ought to be, it is proper to suggest that the claims of the parties, as against each other, shall not be overlooked in the final disposition of the case.

FRED. P. STANTON,
For the Heirs of Jno. C. Hale.

Supreme Court of the United States.

TERM OF 1875-'6.

No. 692.

THE HOT SPRINGS CASES.

JOHN C. HALE

vs.

THE UNITED STATES, HENRY M. RECTOR, AND OTHERS.

BRIEF FOR RECTOR, IN OPPOSITION TO HALE.

ALBERT PIKE,
ROBERT W. JOHNSON,
JOHN B. SANBORN,
CHARLES KING,
Of Counsel for Rector.

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